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By electronic submission to ATR.BankMergers@usdoj.gov

The Honorable Jonathan Kanter
Assistant Attorney General
U.S. Department of Justice
950 Pennslyvania Avenue N.W.
Washington, D.C. 20530

Re: Comment letter on "Banking Guidelines Review"

Dear Assistant Attorney General Kanter:

Thank you for the opportunity to comment on the Department of Justice's renewed request for public input on potential revisions to the 1995 Bank Merger Competitive Review Guidelines (the Bank Merger Guidelines). By way of background, I am an assistant professor business law at the University of Michigan's Stephen M. Ross School of Business and Co-Faculty Director of the University of Michigan's Center on Finance, Law & Policy. Before entering academia, I was an attorney at the Federal Reserve Board of Governors, where I advised the Board on the legal permissibility of bank mergers and acquisitions. This letter supplements the comments I submitted with Federal Trade Commissioner Rohit Chopra on October 16, 2020, in response to DOJ's initial request for public input on the Bank Merger Guidelines.[1]

I applaud the DOJ's efforts to strengthen the Bank Merger Guidelines, consistent with the Biden Administration's whole-of-government approach to enhancing competition throughout the economy. I am particularly encouraged by the DOJ's commitment to "ensure Americans have choices among financial institutions" and to "guard against the accumulation of market power."[2]

As the U.S. Supreme Court recognized in 1963, "Concentration in banking accelerates concentration generally."[3] Indeed, empirical studies consistently demonstrate that more concentrated banking markets favor incumbent firms and deter new entrants, as bigger banks lend to larger, more established businesses.[4] To enhance competition in the U.S. economy, therefore, it is essential that policymakers prevent harmful consolidation in the banking sector.

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[1] See https://www.justice.gov/atr/page/file/1330326/download.

[2] https://www.justice.gov/opa/pr/antitrust-division-seeks-additional-public-comments-bank-merger-competitive-analysis.

[3] United States v. Phila. Nat'l Bank, 374 U.S. 321, 370 (1963).

[4] *See* Nicola Cetorelli & Philip E. Strahan, *Finance as a Barrier to Entry: Bank Competition and Industry Structure in Local U.S. Markets*, 61 J. FIN. 437, 437 (2006) ("The empirical evidence … strongly supports the idea that in markets with concentrated banking, potential entrants face greater difficulty gaining access to credit than in markets in which banking is more competitive."); *id.* at 438 ("[W]e find that more vigorous banking competition … is associated both with more firms in operation and with a smaller average firm size."); Nicola Cetorelli, *Does Bank*

My comments herein are adapted from my forthcoming law review article, *Reviving Bank Antitrust*. My article contends that policymakers have neglected bank antitrust law for the past forty years and thereby encouraged excessive consolidation in the banking sector and the broader economy. I document that policymakers' current approach to bank antitrust—premised on consumer welfare—has failed in two critical respects. First, it has failed on its own terms, as bank mergers have increased the cost and reduced the availability of financial services. Second, because of its narrow focus on consumer prices, the prevailing standard has ignored numerous non-price harms stemming from bank consolidation, including diminished product quality, heightened entry barriers, and greater macroeconomic instability. To correct these shortcomings, the article recommends strengthening the analytical tools used to identify anticompetitive bank mergers and rejecting a narrow focus on consumer prices in favor of a more comprehensive analysis of the costs that bank consolidation imposes on society.

Below I highlight the key themes of my article. I also rebut several misleading arguments that bank lobbying groups have made in response to DOJ's comment request. Finally, I outline my policy recommendations for how the DOJ should strengthen the Bank Merger Guidelines.

1. The Existing Bank Merger Guidelines Are Inadequate

The existing Bank Merger Guidelines have proven deficient in two ways. First, under the current Guidelines, escalating concentration has increased the cost of financial products and has not delivered promised efficiency gains. Second, because of its narrow focus on prices and efficiency—as embodied by the Herfindahl-Hirschman Index (HHI)—the Guidelines have overlooked numerous non-price harms from bank consolidation. The existing Guidelines are therefore ill-suited to combat the negative consequences of bank consolidation.

A. The Bank Merger Guidelines Have Increased Consumer Prices and Restricted Credit

Under the existing Bank Merger Guidelines, bank mergers have hurt consumers and small businesses, with particularly severe consequences for low- and moderate-income (LMI) and minority communities. In addition, large bank mergers have generally failed to produce promised efficiency gains.

1. Bank Mergers Have Harmed Consumers

Under the current Guidelines, consolidation has (1) increased the cost and reduced the availability of consumer loans, (2) inflated the fees that banks charge for basic financial services, and (3) depressed the interest rates that banks pay to their accountholders.

First, the prevailing approach to bank mergers has made it harder and more expensive for consumers to obtain credit. Indeed, empirical evidence has demonstrated that bank consolidation

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Concentration Lead to Concentration in Industrial Sectors? 18 (Fed. Rsrv. Bank of Chi., Working Paper No. 2001-01, 2001), https://fraser.stlouisfed.org/files/docs/historical/frbchi/workingpapers/frbchi_workingpaper_2001-01.pdf ("Bank concentration ... seems to have a significant effect on the market structure of industrial sectors by contributing to increase the average firm size in sectors especially dependent on external finance.").

is associated with higher interest rates on both mortgages and personal loans.[5] For example, one study found that a 100-point increase in a local market's HHI is associated with a twelve- to fourteen-basis point increase in personal loan rates.[6] In addition, bank mergers lead to lower approval rates and higher rejection rates for mortgage applications.[7] Further, bank mergers are associated with a decline in the total amount of lending in a local market.[8] Thus, under the existing Guidelines, bank consolidation has impaired consumers' access to credit.

Second, consolidation has also increased the fees that banks charge their customers. Common transaction fees—including charges for overdrafts, stopped payments, and ATM withdrawals—tend to rise after banks consolidate.[9] In addition, banks in more concentrated areas tack on extra fees for mortgage loans. One study found that non-interest charges on mortgages are, on average, thirty-five basis points—or $1,200—higher in the most concentrated markets compared to the least concentrated markets.[10]

Finally, consolidation has harmed consumers by reducing the interest that banks pay to their depositors. When banks merge, they exploit their market power by decreasing the rates they pay on their checking and savings accounts.[11] Indeed, empirical studies have consistently documented

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[5] *See, e.g.*, Dimuthu Ratnadiwakara & Vijay Yerramilli, Effect of Bank Mergers on the Price and Availability of Mortgage Credit 3 (June 2021) (unpublished manuscript), https://www.bauer.uh.edu/yerramilli/RY-MergersMortgages.pdf (finding that a five percent gain in local market share by an acquiring bank is associated with a forty-two basis point increase in interest rate on its non-agency mortgage loans); Charles Kahn et al., *Bank Consolidation and the Dynamics of Consumer Loan Interest Rates*, 78 J. BUS. 99, 109 (2005) (concluding that bank concentration is positively associated with interest rates for personal loans).

[6] Kahn et al., *supra* note 5, at 109.

[7] *See* Greg Buchak & Adam Jørring, Do Mortgage Lenders Compete Locally? Implications for Credit Access 6 (July 14, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3762250 ("[R]ejection rates for mortgage applications rise significantly when lender concentration is higher."); Ratnadiwakara & Yerramilli, *supra* note 5, at 22 (concluding that acquiring banks decrease approval rates for Federal Housing Administration-insured mortgage applications).

[8] *See* John H. Boyd et al., *Bank Risk-Taking and Competition Revisited: New Theory and New Evidence* 29 (Int'l Monetary Fund, Working Paper No. 06/297, 2006), https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Bank-Risk-Taking-and-Competition-Revisited-New-Theory-and-New-Evidence-20126 ("[B]oth the theory and the data suggest a positive *ceteris paribus* relationship between bank competition and willingness to lend (as opposed to hold government bonds)."); Mark J. Garmaise & Tobias J. Moskowitz, *Bank Mergers and Crime: The Real and Social Effects of Credit Market Competition*, 61 J. FIN. 495, 514 (2006) (finding that the total amount of bank and nonbank credit provision significantly decreases when competition declines).

[9] *See* Timothy H. Hannan, *Retail Deposit Fees and Multimarket Banking*, 30 J. BANKING & FIN. 2561, 2577 (2006) ("For the most common retail fees that every bank charges, banks in more concentrated markets tend to charge higher fees, all else equal."); Vitaly M. Bord, Bank Consolidation and Financial Inclusion: The Adverse Effects of Bank Mergers on Depositors 21 (Dec. 1, 2018) (unpublished manuscript), https://scholar.harvard.edu/files/vbord/files/vbord_-_bank_consolidation_and_financial_inclusion_full.pdf (documenting significant increases in retail account fees when a bank with more than $10 billion in assets acquires a bank with less than $10 billion in assets).

[10] *See* Buchak & Jørring, *supra* note 7, at 3 (comparing markets in the top and bottom decile of concentration).

[11] *See* Valeriya Dinger, *Bank Mergers and Deposit Rate Rigidity*, 47 J. FIN. SERVS. RSCH. 27, 55 (2015) (finding that merging banks are more likely than non-merging banks to change their deposit rates in the first year following a merger).

a "significant negative impact of bank mergers on checking account rates, both in the short and long run."[12] One study, for example, found that bank mergers between 1998 and 2005 were associated with deposit interest rate declines of 8.6 percent and 5.5 percent, respectively, six months and four years post-merger.[13]

In sum, when banks merge, they exploit their market power by increasing the cost of loans, raising transaction fees, and paying less interest to depositors. The existing Bank Merger Guidelines, however, have not protected consumers from these harmful consequences.

2. *Bank Mergers Have Harmed LMI and Minority Communities*

The negative effects of bank consolidation are especially acute for consumers in LMI and minority communities. As Professors Greg Buchak and Adam Jørring document, "while greater concentration reduces credit access for all borrowers, the reduction is particularly large for low-income borrowers … and borrowers of racial minorities."[14] Indeed, increases in banking market concentration are associated with bigger spikes in rejection rates for low-income and non-white loan applicants compared to other borrowers.[15] In addition, banks in more concentrated markets disproportionately increase the fees they charge LMI and minority consumers relative to other customers.[16] As a result, bank consolidation exacerbates disparities in access to affordable financial services.

Credit disparities associated with bank consolidation have produced devastating knock-on effects for LMI and minority communities. For example, high-fee check-cashing companies and other predatory financial service providers have proliferated in LMI areas affected by bank consolidation.[17] In addition, households in LMI neighborhoods are more likely to experience

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[12] Ben R. Craig & Valeriya Dinger, *Bank Mergers and the Dynamics of Deposit Interest Rates*, 36 J. FIN. SERVS. RSCH. 111, 113 (2009); *see also* Robin A. Prager & Timothy H. Hannan, *Do Substantial Horizontal Mergers Generate Significant Price Effects? Evidence from the Banking Industry*, 46 J. INDUS. ECON. 433, 442-49 (1998) (concluding that deposit rates offered by banks that merged between 1991 and 1994 declined relative to those offered by non-merging banks); Erik Heitfield & Robin A. Prager, *The Geographic Scope of Retail Deposit Markets*, 25 J. FIN. SERVS. RSCH. 37, 52-54 (2004) (finding that the inverse relationship between state-level concentration and deposit interest rates strengthened during the 1990s).

[13] Craig & Dinger, *supra* note 12, at 128.

[14] Buchak & Jørring, *supra* note 7, at 6; *see also* Erik J. Mayer, *Big Banks, Household Credit Access, and Intergenerational Economic Mobility* 22 (SMU Cox Sch. of Bus. Rsch. Paper, No. 21-04, Aug. 6, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3816308 ("[L]ow income households face reduced access to credit when local banks are large"); Yong Kyu Gam & Yunqi Zhang, Dismembered Giants: Bank Divestitures and Local Lending 6 (Nov. 2019) (unpublished manuscript), https://www.aeaweb.org/conference/2020/preliminary/paper/EitrD7zf (finding that Black applicants are less likely to obtain mortgages following bank mergers).

[15] *See* Buchak & Jørring, *supra* note 7, at 27 ("[T]he differential rejection probability for a black … or low-income borrower is greater when local markets are more concentrated."); Ratnadiwakara & Yerramilli, *supra* note 5, at 4-5 (reporting that the spike in rejection rates for FHA mortgages following a bank merger is higher for low-income and non-white applicants).

[16] *Cf.* Buchak & Jørring, *supra* note 7, at 27 ("[W]hile … low-income borrowers pay higher fees on average, the fee differential shrinks in more competitive markets.")

[17] *See* Bord, *supra* note 9, at 23-25.

evictions and have debts sent to collection agencies following bank mergers.[18] Due to the ensuing economic hardships, bank consolidation has even been associated with increases in burglary and other property crimes, with the largest effects in LMI areas.[19] Collectively, the negative effects of bank consolidation inhibit LMI and minority populations' economic opportunities. Indeed, intergenerational economic mobility is lower in areas with larger local banks.[20] Bank consolidation, therefore, has been uniquely detrimental for LMI and minority communities.

3. *Bank Mergers Have Harmed Small Businesses*

The existing Bank Merger Guidelines have likewise harmed small businesses. Community banks have traditionally specialized in lending to local entrepreneurs and farmers.[21] When banks consolidate, therefore, small business lending declines, as bigger banks tend to serve larger commercial customers.[22] Numerous empirical studies have documented a reduction in small business lending associated with bank mergers.[23] For small businesses that have been able to obtain loans following a bank merger, credit has become more expensive, average loan size has declined, and nonprice loan terms—such as collateral requirements—have become more onerous.[24] Even mergers that comply with the Bank Merger Guidelines' HHI thresholds impair small business lending. Indeed, Robert Mann found that bank mergers below the 1800/200 HHI screening threshold were associated with an eight percent decline in small business lending between 1996 and 2015.[25] To be sure, there is some evidence that consolidation among the very smallest

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[18] *See id.* at 30-32 (concluding that bank mergers caused 9,000 evictions in LMI areas between 2009 and 2012).

[19] *See* Garmaise & Moskowitz, *supra* note 8, at 518-23.

[20] *See* Mayer, *supra* note 14, at 38-39.

[21] *See* Jeremy C. Kress & Matthew C. Turk, *Too Many to Fail: Against Community Bank Deregulation*, 115 NW. U. L. REV. 647, 654 (2020) (discussing "relational" lending by small banks).

[22] *Cf.* FED. DEPOSIT INS. CORP., FDIC COMMUNITY BANKING STUDY, at 4-7 (2020), https://www.fdic.gov/resources/community-banking/report/2020/2020-cbi-study-full.pdf (noting that community banks' share of small business loans is more than double their share of the banking industry's total assets).

[23] *See* Steven G. Craig & Pauline Hardee, *The Impact of Bank Consolidation on Small Business Credit Availability*, 31 J. BANKING & FIN. 1237, 1248-58 (2007); Paola Sapienza, *The Effects of Banking Mergers on Loan Contracts*, 68 J. FIN. 329, 354 (2002); Allen N. Berger et al., *The Effects of Bank Mergers and Acquisitions on Small Business Lending*, 50 J. FIN. ECON. 187, 217, 222 (1998); Katherine Samolyk & Christopher A. Richardson, *Bank Consolidation and Small Business Lending Within Local Markets* 4 (Fed. Deposit Ins. Corp. Working Paper, No. 2003-02, 2003), https://www.fdic.gov/bank/analytical/working/wp03-02.pdf.

[24] *See* Garmaise & Moskowitz, *supra* note 8, at 515 (concluding that bank mergers between 1995 and 1997 significantly increased the cost of commercial credit and decreased loan size); Sapienza, *supra* note 23, at 354 (finding that acquisitions by large banks increase the cost of credit for small businesses); Jonathan A. Scott & William C. Dunkelberg, *Bank Mergers and Small Firm Financing*, 35 J. MONEY, CREDIT & BANKING 999, 1012 (2003) (documenting more onerous nonprice terms in small business loan contracts following bank mergers).

[25] *See* Robert Mann, Bank Concentration, Local Labor Markets, and Black Neighborhoods 24 (Nov. 3, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3908346. Mann's study excluded mergers occurring during the 2007 and 2008 financial crisis. *See id.* at 12.

community banks may boost local small business lending.[26] Larger mergers, however, generally impair small businesses' access to affordable financial services.[27]

More broadly, bank consolidation's adverse effects on small businesses impede economic development and reduce social welfare. Facing scarcer credit availability, fewer entrepreneurs have started small businesses following bank mergers.[28] The biggest post-merger declines in startup activity have been concentrated in Black communities.[29] With fewer small businesses forming and expanding, bank consolidation has been associated with declines in commercial real estate development, construction activity, and local property prices.[30] Meanwhile, fewer small businesses have led to fewer good jobs. Indeed, in areas affected by bank mergers, unemployment has increased, median income has declined, and income inequality has become even more severe.[31] One study showed that a 142-point increase in county-level HHI is associated with a 0.5 percent drop in employment and a 2 percent drop in average wages, with even sharper declines in Black communities.[32]

4. *Bank Mergers Have Generally Not Produced Economic Efficiencies*

Under the current Guidelines, bank consolidation has not only harmed bank customers, it has also failed to produce efficiency gains. Empirical analyses of larger bank mergers generally "fail to find any significant cost savings" from consolidation.[33] For example, one study of mergers

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[26] *See, e.g.*, Shradha Bindal et al., *Bank Regulatory Thresholds, Merger and Acquisition Behavior, and Small Business Lending*, 62 J. CORP. FIN. 1, 28 (2020) (finding that mergers resulting in banks with less than $10 billion in assets between 2010 and 2015 were associated with increases in small business lending); Robert B. Avery & Katherine A Samolyk, *Bank Consolidation and Small Business Lending: The Role of Community Banks*, 25 J. FIN. SERVS. RSCH. 291, 294 (2004) (finding that mergers involving community banks with less than $1 billion in assets were associated with higher small business loan growth between 1994 and 1997); Bernadette A. Minton et al., *Are Bank Merger Characteristics Important for Local Community Investment?* 3 (Fisher Coll. Of Bus. Working Paper Series, No. 2020-03-012, 2020) (concluding that mergers involving acquirers with less than $10 billion in assets between 1999 and 2016 were associated with increases in small business loan originations).

[27] *See* Bindal et al., *supra* note 26, at 28 (concluding that mergers producing banks with more than $10 billion in assets between 2010 and 2015 were associated with lower small business lending, relative to mergers producing banks with less than $7 billion in assets); Avery & Samolyk, *supra* note 26, at 294 (finding that mergers involving banks with more than $1 billion in assets were associated with lower small business loan growth between 1994 and 1997); Minton et al., *supra* note 26, at 3 (concluding that mergers involving acquirers with more than $10 billion in assets between 1999 and 2016 were associated with fewer small business loan originations).

[28] *See* Bill Francis et al., *Bank Consolidation and New Business Formation*, 32 J. BANKING & FIN. 1589, 1603-09 (2008); Nicola Cetorelli, *Life-Cycle Dynamics in Industrial Sectors: The Role of Banking Market Structure*, 85 FED. RSRV. BANK OF ST. LOUIS ECON. REV. 135, 140-42 (2003); *see also* Nicola Cetorelli & Philip E. Strahan, *Finance as a Barrier to Entry: Bank Competition and Industry Structure in Local U.S. Markets*, 41 J. FIN. 437, 437 (2006) ("[I]n markets with concentrated banking, potential entrants face greater difficulty gaining access to credit than in markets in which banking is more competitive.").

[29] *See* Mann, *supra* note 25, at 27-29.

[30] *See* Garmaise & Moskowitz, *supra* note 8, at 516-17.

[31] *See id.* at 518; Mann, *supra* note 25, at 24-25.

[32] Mann, *supra* note 25, at 24-25, 29-30.

[33] Josel F. Houstan & Michael D. Ryngaert, *The Overall Gains from Large Bank Mergers*, 18 J. FIN. & BANKING 1155, 1155 (1994) (concluding that the efficiency gains from a sample of bank mergers between 1985 and 1991 were

between 1983 and 2014 concluded that cost savings typically do not materialize when a merged bank exceeds $150 billion in assets.[34] This conclusion is consistent with numerous studies finding no economies of scale in larger banks.[35] In fact, rather than reducing costs, some evidence suggests megamergers may result in cost *inefficiencies*.[36] Indeed, any potential cost savings arising from branch consolidation or overhead reduction may be "offset by managerial difficulties in monitoring the larger organizations, conflicts in corporate culture, or problems in integrating systems."[37] To be sure, mergers among very small community banks may enhance economic efficiencies.[38] However, even in cases where banks have reported efficiency gains following a merger, economists generally agree that "[m]ost significant cost savings could be accomplished without [a] merger."[39]

B. The Bank Merger Guidelines Have Ignored Non-Price Competitive Harms

The existing Bank Merger Guidelines have failed in a second way: they have ignored numerous *non-price* harms from bank consolidation. Banks compete with one another not only on pricing

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"statistically indistinguishable from zero"); *see also* Allen N. Berger et al., *The Consolidation of the Financial Services Industry: Causes, Consequences, and Implications for the Future*, 23 J. BANKING & FIN. 135, 162 (1999) ("The studies of US banking generally show very little or no cost X-efficiency improvement on average from … M&As."); Stephen A. Rhoades, *Efficiency Effects of Horizontal (In-Market) Bank Mergers*, 17 J. BANKING & FIN. 411, 419-22 (1993) (concluding that bank mergers in the 1980s generally did not result in efficiency gains).

34 *See* Erik Devos et al., *Efficiency and Market Power Gains in Bank Megamergers: Evidence from Value Line Forecasts*, 45 FIN. MGMT. 1011, 1029 (2016).

35 *See* Hulusi Inanoglu et al., *Analyzing Bank Efficiency: Are "Too-Big-to-Fail" Banks Efficient?*, *in* THE HANDBOOK OF POST CRISIS FINANCIAL MODELING 110, 113 (Emmanuel Haven et al. eds., 2016) (finding negative returns to scale among the fifty largest U.S. commercial banks); Richard Davies & Belinda Tracey, *Too Big to Be Efficient? The Impact of Implicit Subsidies on Estimates of Scale Economies for Banks*, 46 J. MONEY, CREDIT & BANKING 219, 243-44 (2014) (finding no evidence of economies of scale in BHCs with more than $50 billion in assets after controlling for implicit government subsidies); Guohua Feng & Xiaohui Zhang, *Returns to Scale at Large Banks in the US: A Random Coefficient Stochastic Frontier Approach*, 39 J. BANKING & FIN. 135, 144 (2014) (concluding that ninety percent of U.S. commercial banks with more than $1 billion in assets do not experience economies of scale).

36 *See* Allen N. Berger & David B. Humphrey, *Megamergers in Banking and the Use of Cost Efficiency as an Antitrust Defense*, 37 ANTITRUST BULL. 589, 598 (1992) (concluding that a sample of bank mergers in the 1980s resulted in cost inefficiencies); *see also* Telis Demos, *So Your Bank is Buying Another: Don't Panic*, WALL ST. J. (Oct. 6, 2021), https://www.wsj.com/articles/so-your-bank-is-buying-another-dont-panic-11633519800 ("A recent McKinsey & Co. study found that among 58 midcap bank mergers from 2010 to 2021, only 17 merged institutions' returns outperformed peers over the two years postdeal.").

37 Allen N. Berger et al., *The Consolidation of the Financial Services Industry: Causes, Consequences, and Implications for the Future*, 23 J. BANKING & FIN. 135, 162 (1999).

38 *See* John H. Boyd & Stanley L. Graham, *Consolidation in U.S. Banking: Implications for Efficiency and Risk*, *in* BANK MERGERS AND ACQUISITIONS 113, 125-33 (Yakov Amihud & Geoffrey Miller eds., 1998) (documenting that mergers resulting in banks with less than $400 million in assets produced efficiency gains); Adel A. Al-Sharkas et al., *The Impact of Mergers and Acquisitions of the US Banking Industry: Further Evidence*, 35 J. BUS. FIN. & ACCT. 50, 62-64 (2008) (documenting that mergers involving small banks result in larger cost efficiency improvements compared to mergers involving larger banks).

39 Stephen A. Rhoades, *The Efficiency Effects of Bank Mergers: An Overview of Case Studies of Nine Mergers*, 22 J. BANKING & FIN. 273, 277 (1998).

but also on many other dimensions.[40] As the Supreme Court asserted in *Philadelphia National Bank*, "Competition among banks exists at every level—price, variety of credit arrangements, convenience of location, attractiveness of physical surroundings, credit information, investment advice, service charges, personal accommodations, advertising, [and] miscellaneous special and extra services."[41] Under the Bank Merger Guidelines, however, the DOJ has overlooked a litany of non-price competitive harms. Specifically, bank consolidation has (1) diminished product quality by accelerating branch closures, eroding customer service, and weakening consumer privacy; (2) exacerbated "too-big-to-fail" subsidies that distort competition and deter new entrants; and (3) threatened the macroeconomy by impairing monetary policy transmission and intensifying systemic risks.

1. Bank Mergers Have Diminished Product Quality

a. Branches

Access to local branches is a critical aspect of product quality in banking. Consumers benefit from the convenience of in-person service and familiarity with their bankers.[42] Indeed, the overwhelming majority of consumers still use brick-and-mortar branches despite the proliferation of online banking.[43] As Federal Reserve researchers concluded in 2018, "[B]oth depositors and small businesses continue to value local bank branches."[44] Branch closures, therefore, hurt customers who rely on proximity to bank offices.

Bank consolidation has triggered merger-related branch closures throughout the country. As merging banks consolidate operations and cut overhead costs, they typically shutter branches in

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[40] *See* Hsiu-Kwang Wu & Lawrence Connell, Jr., *Merger Myopia: An Economic View of Supreme Court Decisions on Bank Mergers*, 59 VA. L. REV. 860, 875 n.78 (1973) ("Competition between banks is often non-price in nature…. [F]or example, the speed of approval of a loan may be more important to the borrower than a slight difference in the interest rate."); John T. Scott, *Nonprice Competition in Banking Markets*, 44 S. ECON. J. 594, 596 (1978) ("Nonprice competition takes many forms in banking."); *Panel Discussion I: Development of Bank Merger Law*, 13 FORDHAM J. CORP. & FIN. L. 511, 516 (2008) (statement of Bert Foer, President, Am. Antitrust Inst.) ("[N]on-price competition also … focuses on location, customer service, alternative delivery channels, the set of products being offered, brand recognition, and relationship competition."); *see also* Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just., Remarks for the Antitrust New Frontiers Conference: "…And Justice for All": Antitrust Enforcement and Digital Gatekeepers (June 11, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-new-frontiers ("[C]ompetition has price and non-price dimensions. Price effects alone do not provide a complete picture of market dynamics.").

[41] United States v. Phila. Nat'l Bank, 374 U.S. 321, 368 (1963).

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

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

[44] Elliot Anenberg et al., *The Branch Puzzle: Why Are There Still Bank Branches?*, FEDS NOTES (Aug. 20, 2018), https://www.federalreserve.gov/econres/notes/feds-notes/why-are-there-still-bank-branches-20180820.htm.

neighboring locations.[45] In fact, Professor Hoai-Luu Nguyen found a twenty-seven percent increase in the likelihood of a branch closure when merging banks operate in the same census tract.[46] In one notable example, BB&T and SunTrust Bank announced plans to close 800 of their 2,887 branches, or nearly twenty-eight percent of their offices, when the banks merged in 2019.[47] Troublingly, branch closures following bank mergers are typically concentrated in LMI areas, further disadvantaging vulnerable populations.[48]

Merger-related branch closures not only inconvenience consumers, they also deprive communities of financial services. Several studies have documented that a loan applicant's geographic proximity to a bank branch is a key determinant in whether the borrower obtains credit.[49] For example, Professor Erik Mayer analyzed millions of residential mortgage applications from 2010 through 2015 and concluded that "as the distance from the property to the lender's nearest branch increases, the mortgage approval rate decreases, especially when the borrower has a low income."[50] Similarly, Professors Sumit Agarwal and Robert Hauswald surveyed commercial loan applications and concluded that the farther a business is located from the bank's branch office, the less likely the bank is to offer credit.[51] Geographic proximity to a local branch is thus a critical factor in a borrower's ability to obtain credit.

Under the current Bank Merger Guidelines, however, antitrust enforcers have failed to consider reductions in branch access as part of their bank merger evaluations. In response to public commenters' concerns over merger-related branch closures, the Federal Reserve frequently asserts that "federal banking law provides a specific mechanism for addressing branch closings."[52] That mechanism, however, simply requires a bank to provide ninety days' notice prior to an upcoming closure.[53] The law expressly prohibits the relevant agency from blocking a proposed branch

[45] *See* Lydia DePillis, *The Internet Didn't Kill Bank Branches. Bank Mergers Did.*, WASH. POST (July 9, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/07/09/the-internet-didnt-kill-bank-branches-bank-mergers-did.

[46] Hoai-Luu Q. Nguyen, *Are Credit Markets Still Local? Evidence from Bank Branch Closings*, 11 AM. ECON. J.: APPLIED ECON. 1, 15-17 (2019) (analyzing mergers between 1999 and 2012); *see also* Gam & Zhang, *supra* note 14, at 19-20, 51-51 (evaluating bank mergers between 1999 and 2014 and concluding that merging banks closed significantly more branches than competing banks).

[47] Lauren Seay & Ali Shayan Sikander, *Majority of BB&T, SunTrust Branch Closures Still to Come*, S&P GLOBAL MKT. INTEL. (Oct. 5, 2020), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/majority-of-bb-t-suntrust-branch-closures-still-to-come-60511261. Of the closed branches, more than half did not have an active BB&T or SunTrust branch within two miles. *See id.*

[48] *See* GARY A. DYMSKI, THE BANK MERGER WAVE: THE SOCIAL AND ECONOMIC CONSEQUENCES OF FINANCIAL CONSOLIDATION 95 (1999).

[49] *See* Sumit Agarwal & Robert Hauswald, *Distance and Private Information in Lending*, 23 REV. FIN. STUD. 2757, 2768-72 (2010); Mayer, *supra* note 14, at 4.

[50] Mayer, *supra* note 14, at 4.

[51] Agarwal & Hauswald, *supra* note 49, at 2768-72; *see also* Yichen Xu, The Importance of Brick-and-Mortar Bank Offices: Evidence from Small Business and Home Mortgage Lending, 1998-2016, at 4 (2018) (Ph.D. dissertation, University of Delaware), https://udspace.udel.edu/handle/19716/23925#files-area (concluding that merger-induced branch closures reduce small business lending by twenty-two percent even in areas with alternative local branches).

[52] *See, e.g.*, BB&T Corp., *supra* note 84, at 28.

[53] *See* 12 U.S.C. § 1831r-1.

closure by an interstate bank.[54] By failing to address local branch access as part of the bank merger review framework, therefore, the DOJ and the banking agencies effectively allow a crucial aspect of product quality to escape regulatory review.

b. Customer Service

The Bank Merger Guidelines also ignore deterioration in customer service following bank mergers. When a bank obtains market power through consolidation, it may not maintain the same quality of customer service that it previously provided in a more competitive environment.[55] In fact, several studies have documented that banks cut back on customer service after a merger. For example, one analysis of small business survey data concluded that bank mergers "had an adverse effect on an index of service delivery that included a rating of the accessibility of the account manager, services offered, capability of staff, continuity of account manager, and lending criteria."[56] Another study by Federal Reserve economists found that greater concentration reduced the probability that a bank would offer a particular service, such as extended banking hours, automated teller machines, and safety deposit boxes.[57] These analyses undermine banks' frequent claims that consolidation expands their product offerings and enhances customer service.[58] To date, however, the DOJ has failed to consider how bank consolidation might impair customers' banking experiences.

c. Consumer Privacy

Finally, the Bank Merger Guidelines ignore harms to consumer privacy. As the DOJ has noted, "privacy can be an important dimension of quality."[59] The Guidelines, however, overlook the ways in which financial institutions exploit consumers—and gain competitive advantages—by harvesting and monetizing customer data. Mergers allow banks to collect and combine more customer data in new ways, making it easier for them to price discriminate and take advantage of customers' biases.[60] In addition, some banks sell transaction-level data to retailers, which target specific promotions to consumers based on their unique purchasing habits.[61] Consolidation of

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[54] *See id.* at § 1831r-1(d)(3).

[55] *Cf.* Foer, *supra* note 40, at 516 (observing that banks compete with one another via the quality of their customer service).

[56] Scott & Dunkelberg, *supra* note 24, at 1000.

[57] *See* Arnold A. Heggestad & John J. Mingo, *Prices, Nonprices, and Concentration in Commercial Banking*, 8 J. MONEY, CREDIT & BANKING 107, 111 (1976).

[58] *See, e.g.*, BB&T Corp., *supra* note 84, at 29 ("BB&T represents that the combined organization would be better able to leverage increased scale … for the benefit of its consumers. In addition, BB&T represents that existing customers … would have access to … a broader offering of products and services.").

[59] Delrahim, *supra* note 40.

[60] *Cf.* Frederic Boissay et al., *Big Techs in Finance: On the New Nexus Between Data Privacy and Competition* 10-13 (Bank for Int'l Settlements, Working Paper No. 970, 2021) (discussing anticompetitive uses of customer data in finance).

[61] *See* Anick Jesdanun, *For Banks, Data on Your Spending Habits Could Be a Gold Mine*, L.A. TIMES (Dec. 3, 2019), https://www.latimes.com/business/story/2019-12-03/banks-mining-data-on-your-spending-habits; Blake Ellis, *The*

customer data not only undermines consumers' privacy, it also exposes them to increased risks that their personal information could be compromised via data breaches.[62] Despite threats to consumer privacy, though, the current Guidelines neglect this important dimension of product quality.[63]

2. Bank Mergers Have Distorted Competition by Exacerbating the "Too-Big-To-Fail" Subsidy

In addition to diminishing product quality, bank consolidation exacerbates the "too-big-fail" subsidy that gives large banks an unfair competitive advantage over smaller firms. Market participants generally expect that if a large bank were to experience economic distress, the government would bail out the bank rather than let it collapse.[64] As a result, big banks have traditionally been able to borrow at favorable rates relative to smaller competitors.[65] By one estimate, this implicit subsidy reached more than 600 basis points in the lead-up to the 2008 financial crisis.[66] While the size of the "too-big-to-fail" subsidy has shrunk since the crisis, it still persists.[67] When larger banks merge, they obtain the benefit of this funding advantage.[68] The expansion of the "too-big-to-fail" subsidy via bank consolidation distorts the competitive dynamics of the financial sector. Indeed, smaller banks cite the "too-big-to-fail" subsidy as an impediment to fair competition.[69] In addition, megabanks' artificial funding advantages likely deter new banks from forming.[70] Because of the consumer welfare standard's narrow focus,

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Banks' Billion-Dollar Idea, CNN MONEY (July 8, 2011), https://money.cnn.com/2011/07/06/pf/banks_sell_shopping_data/index.htm.

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

[63] Gregory Day & Abbey Stemler, *Infracompetitive Privacy*, 105 IOWA L. REV. 61, 61 (2019) ("[B]ecause antitrust's framework typically uses consumer prices to measure welfare … privacy injuries have largely avoided antitrust scrutiny.").

[64] *See* Saule T. Omarova, *The "Too Big to Fail" Problem*, 103 MINN. L. REV. 2495, 2500 (2019).

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

[66] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-621, LARGE BANK HOLDING COMPANIES: EXPECTATIONS OF GOVERNMENT SUPPORT 51 (2014).

[67] Following the 2008 crisis and ensuing regulatory reforms, typical estimates of the "too-big-to-fail" subsidy have ranged from roughly 20 to 100 basis points. *See* Nicola Cetorelli & James Traina, *Resolving "Too Big to Fail"* 1-2 n.3 (Fed. Rsrv. Bank of N.Y., Staff Rep. No. 859, 2018), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr859.pdf (summarizing various estimates).

[68] A study by Federal Reserve Bank of Philadelphia economists found that banks paid an extra premium for mergers that would qualify them for "too-big-to-fail" status. *See* Elijah Brewer III & Julapa Jagtiani, *How Much Did Banks Pay to Become Too-Big-to-Fail and to Become Systemically Important?*, 43 J. FIN. SERVS. RSCH. 1, 4 (2013).

[69] *See* INDEPENDENT CMTY. BANKERS OF AM., TOO-BIG-TO-FAIL SUBSIDIES THREATEN ECONOMY, COMMUNITY BANKS, AND TAXPAYERS 1-2 (2014), https://www.icba.org/docs/default-source/icba/advocacy-documents/testimony/113th-congress/test073114.pdf?sfvrsn=2.

[70] *Cf.* David Zaring, *Modernizing the Bank Charter*, 61 WM. & MARY L. REV. 1397, 1441-47 (2020) (documenting decline in de novo bank charters following 2008 financial crisis).

however, antitrust enforcers do not take into account how bank consolidation impairs competition by perpetuating the "too-big-to-fail" subsidy.

3. Bank Mergers Intensify Macroeconomic Threats

The Bank Merger Guidelines also overlook the ways in which bank consolidation threatens the macroeconomy. A strong economy promotes competition by encouraging new start-ups, fostering foreign investment, and boosting consumer demand.[71] Bank consolidation, however, imperils the macroeconomy—and thereby lessens competition—by impeding monetary policy transmission and intensifying systemic risks.

a. Impaired Monetary Policy Transmission

In order to achieve sustainable economic growth, the Federal Reserve sets monetary policy to stimulate economic activity during downturns and prevent overheating during expansions. Escalating concentration in the banking sector, however, disrupts the transmission of monetary policy. In uncompetitive markets, banks do not reliably alter their behavior in response to Federal Reserve policy changes and, as a result, monetary policy does not have its desired effect.[72] For example, when the Federal Reserve loosens monetary policy to encourage economic activity, lenders in concentrated areas exploit their market power by maintaining high interest rates instead of passing on cheaper rates to borrowers.[73] Thus, banks capture bigger profits but, in the process, they thwart the Federal Reserve's goal of spurring borrowing and economic activity. In one estimate, Professors David Scharfstein and Adi Sunderam calculate that a one-standard deviation increase in county-level lender concentration reduces total monetary policy transmission by almost thirty percent.[74] By blunting the effect of monetary policy, therefore, bank concentration weakens the United States' resilience to macroeconomic shocks like the 2008 financial crisis and the Covid-19 pandemic.

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[71] *See generally* LIDA R. WEINSTOCK, CONG. RSCH. SERV., IF11020, INTRODUCTION TO U.S. ECONOMY: BUSINESS INVESTMENT (2021), https://crsreports.congress.gov/product/pdf/IF/IF11020 (analyzing how strong macroeconomy promotes business investment).

[72] *See, e.g.*, Nimrod Segev & Matthew Schaffer, *Monetary Policy, Bank Competition, and Regional Credit Cycles: Evidence from a Quasi-Natural Experiment*, 64 J. CORP. FIN. 101494 (2020); Yifei Wang et al., *Bank Market Power and Monetary Policy Transmission: Evidence From a Structural Estimation* 29 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27258, 2020); Dean Corbae & Ross Levine, Competition Stability, and Efficiency in Financial Markets 27-28 (Sept. 14, 2018) (unpublished manuscript), https://faculty.haas.berkeley.edu/ross_levine/Papers/JH091418.pdf; Adonis Antoniades, Monetary Easing and the Lending Concentration Channel of Monetary Policy Transmission 24-30 (Sept. 4, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2702374; *see also* Youngju Kim et al., *Bank Competition and Transmission of Monetary Policy*, 28 APPLIED ECON. LETTERS 421, 421 (2020) ("GDP and credit respond less strongly to monetary policy shocks in economies where the bank market is more concentrated.").

[73] David Scharfstein & Adi Sunderam, Market Power in Mortgage Lending and the Transmission of Monetary Policy 21-22 (Aug. 2016) (unpublished manuscript), https://www.hbs.edu/ris/Publication%20Files/Market%20Power%20in%20Mortgage%20Lending%20and%20the%20Transmission%20of%20Monetary%20Policy_8d6596e6-e073-4d11-83da-3ae1c6db6c28.pdf. When the Federal Reserve tightens monetary policy to prevent overheating, a similar effect occurs: banks in concentrated areas exploit their market power by maintaining their deposit rates instead of passing on higher interest rates to depositors. *See* Dinger, *supra* note 11, at 55.

[74] Scharfstein & Sunderam, *supra* note 73, at 2.

b. Increased Systemic Risks

In addition to impeding monetary policy, bank consolidation also threatens competition by intensifying risks to financial stability. In the lead-up to the 2008 financial crisis, antitrust enforcers authorized a series of megamergers that created "too big to fail" conglomerates.[75] When some of these firms collapsed, they inflicted severe economic damage that diminished competition throughout the economy.[76] Indeed, the ensuing financial crisis wiped out nearly one in four insured depository institutions, substantially reducing competition in the banking sector.[77] The crisis also triggered a torrent of corporate bankruptcies, eliminating competitors in numerous industries.[78] This economic meltdown was a predictable consequence of excessive consolidation in the banking sector. In fact, numerous empirical studies have demonstrated that large bank mergers increase financial instability.[79] The Bank Merger Guidelines unwisely ignore systemic risks despite the threat that financial crises pose to competition.

2. Bank Lobbyists' Arguments Are Misleading and Unpersuasive

Bank lobbying groups have made several misleading arguments in an effort to convince the DOJ to weaken the Bank Merger Guidelines despite compelling evidence that the Guidelines are already too lenient. This Section rebuts two of their most specious claims. First, that the U.S. banking market is unconcentrated. And second, that the emergence of online banks and fintech companies justifies weakening the Bank Merger Guidelines.

A. The U.S. Banking Market Is Extremely Concentrated

Despite bank lobbying groups' claims, the U.S. banking market is extremely concentrated. Nationwide banking market concentration has increased dramatically in the past forty years. In the

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

[76] *See id.*

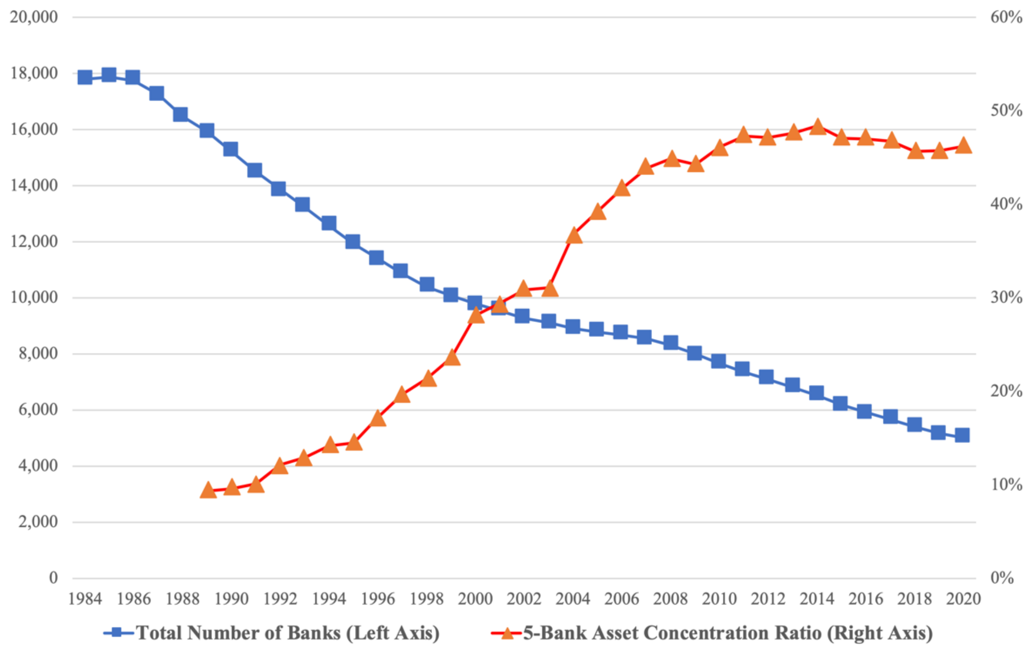
[77] *See* FED. DEPOSIT INS. CORP., CRISIS AND RESPONSE: AN FDIC HISTORY, 2008-2013 (2017) (reporting that the number of insured depository institutions in the United States declined from 8,534 in 2007 to 6,509 in 2014).

[78] *See* CORNERSTONE RESEARCH, TRENDS IN LARGE CORPORATE BANKRUPTCY AND FINANCIAL DISTRESS: MIDYEAR 2021 UPDATE 2 (2021), https://www.cornerstone.com/Publications/Reports/Trends-in-Large-Corporate-Bankruptcy-and-Financial-Distress-Midyear-2021-Update (documenting spike in bankruptcy filings after 2008 financial crisis).

[79] *See, e.g.*, Gregor N.F. Weiss et al., *Systemic Risk and Bank Consolidation: International Evidence*, 40 J. BANKING & FIN. 165, 174-77 (2014) (finding a significant increase in the post-merger systemic risk of consolidating banks and their competitors); *see also* Simone Varotto & Lei Zhao, *Systemic Risk and Bank Size*, 82 J. INT'L MONEY & FIN. 45, 53-54 (2018) (concluding that a bank's size, while not determinative, is the primary driver of its systemic riskiness); Amy G. Lorenc & Jeffrey Y. Zhang, *How Bank Size Relates to the Impact of Bank Stress on the Real Economy*, 62 J. CORP. FIN. 101592 (2020) (concluding that financial stress at large banks has a significantly stronger, negative impact on the real economy compared to smaller banks); Luc Laeven et al., *Bank Size and Systemic Risk* 14-18 (Int'l Monetary Fund, Staff Discussion Note No. 14/04, 2014), https://www.imf.org/external/pubs/ft/sdn/2014/sdn1404.pdf (documenting that systemic risk contribution increases with a bank's size and is significantly higher for banks with more than $50 billion in assets); Nils Moch, *The Contribution of Large Banking Institutions to Systemic Risk: What Do We Know? A Literature Review*, 69 REV. ECON. 231, 231 (2018) (reviewing studies and concluding that "bank size is a key predictor for systemic risk and … the largest banks disproportionately contribute to overall risk").

1980s, the five largest U.S. banks collectively controlled less than ten percent of the assets in the U.S. banking system.[80] By 2020, however, the five biggest commercial banks accounted for nearly fifty percent of U.S. banking system assets.[81] Meanwhile, the total number of U.S. banks plummeted by more than two-thirds over the same time span, in large part due to mergers and acquisitions.[82] Figure 1 depicts the surge in U.S. banking sector concentration since the 1980s.[83]

Figure 1:
Concentration in the U.S. Banking Sector



[80] In 1989, the five largest U.S. banks—Citibank, Bank of America, Chase Manhattan Bank, Morgan Guaranty Trust, and Manufacturers Hanover—collectively controlled $442 billion in assets, or nine percent of total assets in the U.S. banking system. *See* MOODY'S BANK & FINANCE MANUAL a2 (1991) (listing assets of largest banks); BankFindSuite: Find Annual Historical Bank Data, FED. DEPOSIT INS. CORP., https://banks.data.fdic.gov/bankfind-suite/historical [hereinafter FDIC BankFindSuite] (reporting that U.S. commercial and savings banks controlled a total of $4.74 trillion in assets in 1989).

[81] *See* Global Financial Development DataBank, THE WORLD BANK, https://databank.worldbank.org/reports.aspx?source=global-financial-development [hereinafter World Bank Global Financial Development DataBank] (reporting that the five largest banks controlled forty-six percent of U.S. banking system assets in 2020).

[82] *See* FDIC BankFindSuite, *supra* note 80 (reporting that the number of U.S. commercial and savings banks declined from 17,811 in 1984 to 5,004 in 2020); *see also* Stephen A. Rhoades, *Bank Mergers and Industrywide Structure, 1980-94*, at 4 (Bd. of Governors of the Fed. Rsrv. Sys., Staff Stud. No. 169, 1996), https://www.federalreserve.gov/pubs/staffstudies/1990-99/ss169.pdf (identifying 6,347 bank mergers between 1980 and 1994); Steven J. Pilloff, *Bank Merger Activity in the United States, 1994-2003*, at 3 (Fed. Rsrv. Sys., Staff Stud. No. 176, 2004), https://www.federalreserve.gov/pubs/staffstudies/2000-present/ss176.pdf (identifying 3,517 bank mergers between 1994 and 2003).

[83] Data for Figure 1 is sourced primarily from the FDIC's Bank Find Suite and the World Bank's Global Financial Development Data Bank. *See* FDIC BankFindSuite, *supra* note 80 (reporting total number of U.S. commercial and savings banks from 1984 to 2020); World Bank Global Financial Development DataBank, *supra* note 81 (reporting five-bank asset concentration ratio between 2000 and 2020). The author manually calculated the five-bank asset concentration ratio for the period from 1989 to 1999 using bank Call Report data from the FDIC.

Nationwide banking statistics mask even higher concentration levels in local markets. Consumers and businesses in most geographic areas face a dearth of local banking options. Indeed, **more than three-quarters of the United States' local banking markets are considered uncompetitive**, with HHIs exceeding the DOJ's 1,800 threshold for high concentration.[84] In fact, **the mean HHI for all U.S. banking markets is almost 3,500**.[85] In an average local market, therefore, a consumer might have only three banking options.[86] Concentration is even more pronounced in rural areas, where nearly 90 percent of local markets are considered highly concentrated.[87] Urban city centers are also much more highly concentrated than the broader metropolitan areas in which they are located.[88] Moreover, local banking market concentration continues to increase, albeit less rapidly than nationwide concentration.[89]

Bank lobbying groups have selectively presented evidence to make it appear that banking markets are much less concentrated than they actually are. For example, a comment letter by the Bank Policy Institute (BPI) and Mid-Size Bank Coalition of America (MSBCA) reports nationwide concentration for various industries based on sales data—a figure that is rarely used in describing bank concentration.[90] Measuring concentration based on asset size—a more reliable indicator of a bank's market power—indicates that nationwide bank concentration is more than double what the bank lobbying groups suggest.[91] Furthermore, BPI claims that its own analysis of local banking markets demonstrates that local markets are unconcentrated.[92] BPI's analysis however, is highly skewed, because it uses weighted average HHIs. It therefore trivializes the three-quarters of local banking markets that are considered uncompetitive, with HHIs in excess of 1,800.[93]

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[84] *See* Andrew P. Meyer, *Market Concentration and Its Impact on Community Banks*, FED. RSRV. BANK OF ST. LOUIS (Apr. 12, 2018), https://www.stlouisfed.org/publications/regional-economist/first-quarter-2018/concentration-community-banks; *see also* BB&T Corp., 106 Fed. Rsrv. Bull. 1, 5 n.26 (2020) ("Under the DOJ Bank Merger Guidelines, a market is considered … highly concentrated if the post-merger HHI exceeds 1800.").

[85] *See* Meyer, *supra* note 84.

[86] In a market with three banks that each control 33.3 percent market share, the HHI is (33.3^2 + 33.3^2 + 33.3^2) = 3,333.

[87] *See* Meyer, *supra* note 84.

[88] *See* Letter from Americans for Financial Reform Education Fund to Makan Delrahim, Assitant Attorney General, Antitrust Division, U.S. Dep't of Justice 7-8 (Oct. 16, 2020), https://www.justice.gov/atr/page/file/1330281/download.

[89] *See id.* (noting that the mean HHI for U.S. banking markets increased from 3,316 in 2006 to 3,468 by 2017).

[90] *See* Letter from Bank Policy Institute and Mid-Size Bank Coalition of America to Jonathan Kanter, Assistant Attorney General for the Antitrust Division, U.S. Department of Justice 14-15 (Feb. 10, 2022), https://bpi.com/wp-content/uploads/2022/02/BPI-Responds-to-DoJ-Review-of-Competitive-Effects-of-Bank-Mergers.pdf [hereinafter BPI and MSBCA Comment Letter].

[91] *See supra* Figure 1.

[92] BPI and MSBCA Comment Letter, *supra* note 90, at App. A.

[93] *See supra* note 84 and accompanying text.

B. Fintech Does Not Justify Lax Bank Antitrust Enforcement

Bank lobbying groups insist that the DOJ should weaken bank antitrust enforcement because the current Bank Merger Guidelines ignore competition from online banks and fintech companies. To be sure, innovative financial technologies have changed the competitive dynamics of the banking sector.[94] Despite the growth of fintech and online banks, however, policymakers should remain skeptical about the extent to which these new technologies neutralize the anticompetitive effects of bank consolidation. In fact, the emergence of digital financial service providers does not justify lax bank antitrust enforcement because consumers and businesses still strongly prefer to patronize a local bank. Further, financial technology does not penetrate many LMI and minority communities, where the adverse effects of bank consolidation are felt most acutely. Finally, the Bank Merger Guidelines already account for nonbank competition.

1. Fintech is Not a Substitute for Traditional Banks

Fintech is unlikely to combat the anticompetitive effects of bank consolidation because digital financial services do not substitute for locally-rooted banks. Consumers and small businesses have long had the option to obtain financial services from distant depository institutions and other non-local providers.[95] However, when the Supreme Court implemented the judicial framework governing bank mergers in the 1960s, it defined the relevant competitive market as local in scope because "[i]ndividuals and corporations typically confer the bulk of their patronage on banks in their local community."[96] Sixty years later, customers' preference for nearby banks remains strong, even with the advent of digital financial services.[97] Because borrowers and depositors still favor local banks, fintech is unlikely to eliminate competitive harms when banks disappear through consolidation.

Despite the emergence of fintech, consumers and businesses still prefer to bank locally. Indeed, customers consistently rate "convenience of location" as their top reason for choosing a financial institution.[98] Thus, most customers still maintain checking or savings accounts at a nearby bank, even though fintech companies generally offer higher interest rates to savers than traditional depository institutions.[99] Even customers who do some of their banking online continue to patronize a nearby bank branch.[100] For instance, in the Federal Reserve's 2019 Survey of

[94] *See* Rory Van Loo, *Making Innovation More Competitive: The Case of Fintech*, 65 UCLA L. REV. 232, 234 (2018) (asserting that "fintech alters the competition policy analysis…").

[95] *See* United States v. Phila. Nat'l Bank, 374 U.S. 321, 360 (1963) (acknowledging that some borrowers and depositors "may find it practical to do a large part of their banking business outside their home community").

[96] *Id.* at 358.

[97] *See* Anenberg et al., *supra* note 44.

[98] *See Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (2019), https://www.federalreserve.gov/econres/scfindex.htm (select "Historic Tables" and "Checking Box").

[99] *See* David Herpers, *Why Digital Banks Offer Higher Interest Rates on Savings Accounts*, FORBES (June 4, 2021), https://www.forbes.com/sites/forbesfinancecouncil/2021/06/04/why-digital-banks-offer-higher-interest-rates-on-savings-accounts/?sh=2cf43d086ccc.

[100] *See* Anenberg et al., *supra* note 44.

Consumer Finances, families who used online banking were only six percentage points less likely to report visiting a local bank branch in the preceding year compared to families that did not use online banking.[101] The proportion of consumers who regularly patronize a local branch has actually increased as fintech and online banking has expanded over the past decade.[102] Thus, as the Federal Reserve concluded, "[o]nline banking appears to be an imperfect substitute for … visiting a local branch."[103]

Because of customers' preference for traditional, local banks, fintech does not negate the harmful effects of bank consolidation. When a bank merges with a competitor, its customers generally do not switch to a fintech company; rather, customers continue to patronize the bank despite its newfound market power.[104] Consider a study by Professor Jack Liebersohn that analyzed the competitive consequences of bank mergers between 1997 and 2017.[105] Liebersohn found "little evidence that new entry by non-bank lenders ameliorates the anticompetitive effects of bank mergers."[106] Fintech is especially unlikely to offset the decline in small business lending when community banks merge.[107] These conclusions are consistent with the well-documented evidence that bank consolidation increases the cost and reduces the availability of financial services, despite the presence of alternative financial service providers.

Customers' strong preference for traditional, local banks is unlikely to diminish despite the Covid-19 pandemic and looming demographic changes. Although the pandemic increased usage of online and mobile banking, it also led to more in-person visits to local branches.[108] Indeed, customers' patronage of branches "increased during the Covid-19 pandemic by almost as much as their use of banks' mobile apps."[109] Moreover, consumers' reliance on branches will likely persist even as

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[101] Neil Bhutta et al., *Changes in U.S. Family Finances from 2016 to 2019: Evidence from the Survey of Consumer Finances*, 106 Fed. Rsrv. Bull. 1, 17 (2020) (reporting that seventy-nine percent of families used online banking had visited a local bank branch in the preceding twelve months, compared to eighty-five percent of families that did not use online banking). Almost all households that patronize a local bank branch do so to access services other than just using the ATM. *See* Anenberg et al., *supra* note 44.

[102] *Compare* FED. DEPOSIT INS. CORP., HOW AMERICA BANKS: HOUSEHOLD USE OF BANKING AND FINANCIAL SERVICES 23 (2019) (reporting that eighty-three percent of banked households visited a branch at least once in the previous year), *with* FED. DEPOSIT INS. CORP., 2013 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 10 (2014) (reporting that seventy-nine percent of banked households visited a branch at least once in the previous year).

[103] Bhutta et al., *supra* note 101, at 17.

[104] *Cf.* Isil Erel & Jack Liebersohn, *Does Fintech Substitute for Banks? Evidence from the Paycheck Protection Program* 33 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27659, 2020), https://www.nber.org/system/files/working_papers/w27659/w27659.pdf (concluding that "the degree of substitution between FinTechs and traditional banks is economically small").

[105] Jack Liebersohn, How Effective is Antitrust Intervention? Evidence From Bank Mergers (June 4, 2021), https://www.dropbox.com/s/plvsp4eqz2lmphn/liebersohn_banks_submissionaer.pdf?dl=0.

[106] *Id.* at 6.

[107] *See* Tetyana Balyuk et al., What is Fueling FinTech Lending? The Role of Banking Market Structure 30 (June 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3633907.

[108] *See* Allissa Kline et al., *The Demise of Branches Is Overstated, Big-Bank Executives Say*, AM. BANKER (Nov. 8, 2021), https://www.americanbanker.com/news/the-demise-of-branches-is-overstated-big-bank-executives-say.

[109] *Id.*

"digital natives" comprise a larger proportion of the U.S. population. Today, young people are only marginally less likely than senior citizens to patronize a local bank branch.[110] Further, Federal Reserve researchers predict that "when currently young depositors transition into old age they will have a stronger preference for visiting their local branch," notwithstanding their technological fluency.[111] For many customers, therefore, locally-rooted banks remain an irreplaceable source of financial services despite the emergence of fintech.

2. Fintech Does Not Penetrate Many Communities

Fintech does not neutralize the anticompetitive effects of bank consolidation for a second reason: digital financial services do not penetrate many LMI and minority communities where the adverse consequences of consolidation are most severe. LMI communities often lack reliable Internet access necessary for consumers to use fintech. Moreover, even in LMI areas that have adequate technological infrastructure, consumers frequently resist fintech, in part due to the fintech sector's history of discriminating against disadvantaged populations. Thus, notwithstanding fintech's emergence, lax bank antitrust enforcement is likely to continue harming LMI populations.

Using fintech is not an option for many communities that lack reliable Internet access. Indeed, one-third of U.S. households lack high-speed Internet.[112] Minority and low-income communities are disproportionately underserved.[113] In fact, Black households are twenty percent less likely than White households to have high-speed Internet access when controlling for income, education, and employment.[114] As Professor Terri Friedline has observed, "Rates of access to high speed internet and smartphones are nowhere near rates that are necessary for fintech to expand banking and financial services, let alone to presumably *replace* the physical banking infrastructure."[115]

Even in areas that have adequate Internet access, LMI and minority consumers are often reluctant to use fintech. To be sure, "Black, rural, [and] low-income consumers are among the groups least willing to use fintech products."[116] Minority and low-income households strongly prefer to bank in-person.[117] Thus, Black and Hispanic borrowers are significantly less likely than White

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[110] *See* Anenberg, *supra* note 44 (noting that survey respondents under the age of thirty-five were only six percentage points less likely to have visited a local branch in the preceding year compared to respondents over the age of seventy-five).

[111] *Id.*

[112] *See* TERRI FRIEDLINE, BANKING ON A REVOLUTION: WHY FINANCIAL TECHNOLOGY WON'T SAVE A BROKEN SYSTEM 141 (2021)

[113] *See id.* at 138.

[114] *See id.* at 141, 152 n.56.

[115] *Id.* at 138 (emphasis in original).

[116] Claire Williams, *Fintech Backers Tout Expanded Access to Financial Services, But Underserved Groups Aren't as Interested*, MORNING CONSULT (Mar. 11, 2021), https://morningconsult.com/2021/03/11/fintech-inclusion-regulation-poll/.

[117] FRIEDLINE, *supra* note 115, at 10 n.42.

borrowers to seek loans from fintech companies, even when controlling for Internet access and other factors.[118]

LMI and minority consumers' reluctance to use digital financial services may be attributable, in part, to the fintech sector's history of discriminating against disadvantaged populations. The potential for fintech companies to use consumers' personal information in a discriminatory way is well documented.[119] As Professors Pamela Foohey and Nathalie Martin summarize, "[T]he 'tech' part of fintech results in inadvertent racial, ethnic, and gender discrimination based on algorithms that leverage big data."[120] Fintech's biases became particularly evident during the Covid-19 pandemic. When Black-owned firms applied for Paycheck Protection Program loans from online lenders, they were less than half as likely as White-owned firms to obtain all of the funding they sought.[121] The racial funding gap at online lenders was significantly higher than at traditional banks.[122] LMI and minority consumers' aversion to fintech may therefore be connected to previous discrimination.

3. The Bank Merger Guidelines Already Account for Nonbank Competition

Finally, the DOJ should not weaken the Bank Merger Guidelines on account of fintech competition because the current Guidelines already permit higher concentration in banking compared to other industries in recognition of the fact that banks face competition from nonbank financial service providers. The Bank Merger Guidelines state that the agencies "are likely to examine a [bank merger] in more detail" if the merger increases a market's HHI by more than 200 points to a level above 1,800.[123] By contrast, the 2010 Horizontal Merger Guidelines provide that mergers in other sectors "warrant scrutiny" and "potentially raise competitive concerns" if they increase a market's HHI by more than 100 points to a level above 1,500.[124] The DOJ explained that it uses a looser test for banking because depository institutions face competition from nonbanks that is not reflected in bank HHI data.[125] Thus, the Bank Merger Guidelines are already more permissive of

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[118] *See* Andreas Fuster et al., *The Role of Technology in Mortgage Lending*, 32 REV. FIN. STUDS. 1854, 1890-91 (2019).

[119] *See, e.g.*, Matthew A. Bruckner, *The Promise and Perils of Algorithmic Lenders' Use of Big Data*, 93 CHI.-KENT L. REV. 3, 25-29 (2018) (discussing algorithmic discrimination in lending); Anya Price & Daniel Schwarcz, *Proxy Discrimination in the Age of Artificial Intelligence and Big Data*, 105 IOWA L. REV. 1257, 1285-86 (2020) (discussing proxy discrimination in insurance).

[120] Pamela Foohey & Nathalie Martin, *Fintech's Role in Exacerbating or Reducing the Racial Wealth Gap*, 2021 U. ILL. L. REV. 459, 498.

[121] FED. RESERVE BANKS, SMALL BUSINESS CREDIT SURVEY: 2021 REPORT ON FIRMS OWNED BY PEOPLE OF COLOR 15 (2021), https://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2021/sbcs-report-on-firms-owned-by-people-of-color.

[122] *See id.*

[123] U.S. DEP'T OF JUST., BANK MERGER COMPETITIVE REVIEW—INTRODUCTION AND OVERVIEW 1 (1995), https://www.justice.gov/sites/default/files/atr/legacy/2007/08/14/6472.pdf [hereinafter BANK MERGER GUIDELINES].

[124] U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 19 (2010), https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf. The 2010 Guidelines establish a presumption of anti-competitiveness for a non-banking merger that increase a market's HHI by more than 200 points to a level above 2,500. *Id.*

[125] *See* Robert E. Litan, Deputy Assistant Att'y Gen., U.S. Dep't of Just., Address Before the Antitrust Section of the ABA: Antitrust Assessment of Bank Mergers (Apr. 6, 1994) ("[B]anks face competition in virtually all of their

consolidation in banking on account of competition from nonbanks and should not be weakened further.[126]

3. The DOJ Should Strengthen and Expand the Bank Merger Guidelines

For the foregoing reasons, I urge the DOJ to strengthen the Bank Merger Guidelines by (1) improving and expanding existing analytical tools and (2) broadening the focus beyond the HHI to include more comprehensive analyses of the competitive harms that bank consolidation imposes on society. Collectively, these reforms would help alleviate concentration in the financial sector and thereby mitigate harms from consolidation throughout the economy.

A. Strengthening Analytical Tools

As a first step toward revitalizing bank antitrust, the DOJ should strengthen and expand the analytical tools used to identify anticompetitive bank consolidation. I propose four specific enhancements: (1) reducing the HHI threshold in the Bank Merger Guidelines, (2) deemphasizing mitigating factors in bank merger reviews, (3) evaluating the mix of large and small institutions in markets experiencing mergers, and (4) considering the effects of common ownership of competing banks.

1. Lower the HHI Threshold

To mitigate competitive harms from bank consolidation, the DOJ should reduce the HHI threshold that triggers enhanced scrutiny of bank mergers. Under the current Bank Merger Guidelines the DOJ is unlikely to challenge a proposed merger if the post-merger HHI would be below 1,800 or the merger would cause the HHI to increase by less than 200 points.[127] This 1800/200 threshold has proven insufficient to prevent anticompetitive harms. Indeed, even bank mergers that comply with the 1800/200 threshold are associated with higher cost and lower availability of financial products.[128] Accordingly, the DOJ should reduce the HHI threshold for enhanced screening of bank mergers. As one possibility, the DOJ could commit to heightened scrutiny of a bank merger that would increase a market's HHI by more than 100 points to a level above 1,500—the same

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services from non-banks … that often cannot be captured by computing HHIs based solely on deposits. We have recognized the strength of that competition generally by screening out mergers causing changes in HHI up to 200 even where the post-merger HHI in the market is 1800 or higher.").

[126] The Bank Merger Guidelines are weaker than the 2010 Guidelines in another respect: they do not establish an upper limit on concentration beyond which the agencies presumptively challenge a merger. The 2010 Guidelines state that, in non-banking industries, the DOJ will ordinarily seek to block a merger that increases a market's HHI by more than 200 points to a level above 2,500. *See supra* note 124. The Bank Merger Guidelines, however, create no such presumption.

[127] *See supra* note 123 and accompanying text.

[128] *See, e.g.*, Mann, *supra* note 25, at 24 (concluding that bank mergers below the 1800/200 HHI threshold were associated with an eight percent decline in small business lending).

HHI threshold at which nonbanking mergers "potentially raise[s] competitive concerns," according to the DOJ's general merger guidelines.[129]

Reducing the HHI threshold would reinforce a bank's obligation to demonstrate that a proposed merger's public benefits outweigh its anticompetitive effects. In contrast to mergers in other industries, a bank merger that would "substantially lessen competition" is not necessarily unlawful.[130] Unique to banking, an otherwise anticompetitive merger is permissible if the merging banks "establish that the merger's benefits to the community outweigh its anticompetitive disadvantages."[131] The banks could show, for example, that the proposed merger would enable the combined firm to offer new products, better service, or greater convenience for customers.[132] As the Supreme Court has emphasized, however, in order to offset anticompetitive effects, purported public benefits must be specific, and the banks must demonstrate that they would not be achievable absent the proposed merger.[133] Thus, lowering the HHI threshold would not necessarily result in more bank merger denials, but it would intensify banks' burden to demonstrate the public benefits of potentially anticompetitive combinations.

The banking sector has argued—erroneously—that the 1800/200 threshold is already too stringent compared to the 2500/200 threshold that triggers a presumption of anti-competitiveness in other industries.[134] The comparison to the 2010 Guidelines' 2500/200 threshold, however, is inapposite. First, a proposed bank merger that exceeds the Bank Merger Guidelines' HHI threshold merely receives enhanced scrutiny rather than a presumption of anti-competitiveness, as is the case for nonbank mergers that exceed the 2500/200 threshold.[135] In this way, the Bank Merger Guidelines' HHI screen is more akin to the 1500/100 threshold in the 2010 Guidelines for potentially anticompetitive mergers that "warrant scrutiny."[136] Second, the costs of "false negatives"—or misguided decisions to allow anticompetitive mergers—are higher in banking than in other industries.[137] Compared to other industries with lower entry barriers, regulation and competitive

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[129] HORIZONTAL MERGER GUIDELINES, *supra* note 124, at 19; *see also supra* note **124** and accompanying text (discussing the 1500/100 threshold for nonbanking mergers). The banking agencies and the DOJ should conduct empirical analyses to determine an appropriate HHI threshold that would prevent anticompetitive bank mergers but not preclude socially beneficial consolidation.

[130] *See* 12 U.S.C. §§ 1828(c)(5)(B), 1842(c)(1)(B).

[131] United States v. Third Nat'l Bank in Nashville, 390 U.S. 170, 182 (1968).

[132] *Cf. id.* at 185-86 (discussing potential public benefits of bank mergers).

[133] *See id.* at 186, 190.

[134] *See, e.g.*, *See, e.g.*, Letter from Gregg Rozansky, Senior Vice President, Bank Pol'y Inst., to Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just. 2, 11 (Oct. 15, 2020), https://www.justice.gov/atr/page/file/1330306/download; Comments of Wachtell, Lipton, Rosen & Katz to U.S. Dep't of Just., Antitrust Div. 4 (Oct. 15, 2020), https://www.justice.gov/atr/page/file/1330316/download.

[135] *Compare* BANK MERGER GUIDELINES, *supra* note 123, at 3 ("The [DOJ] and the banking agencies are likely to examine a transaction in more detail if it exceeds the 1800/200 threshold…."), *with* HORIZONTAL MERGER GUIDELINES, *supra* note 124, at 19 ("Mergers resulting in highly concentrated markets [with an HHI above 2,500] that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power.").

[136] HORIZONTAL MERGER GUIDELINES, *supra* note 124, at 19.

[137] *Cf.* Frank H. Easterbrook, *Does Antitrust Have a Comparative Advantage?*, 23 HARV. J. L. & PUB. POL'Y 5, 8 (1999) (discussing "false positives" and "false negatives" in antitrust enforcement); *see also* Frank H. Easterbrook,

disadvantages deter de novo banks from forming to counteract the harmful effects of an anticompetitive merger.[138] Moreover, in light of banking's unique and essential role in the economy, anticompetitive bank mergers inflict more extensive and longer-lasting societal harms than anticompetitive mergers in other industries. As the Supreme Court stated in *Philadelphia National Bank*, "[I]f the costs of banking services and credit are allowed to become excessive by the absence of competitive pressures, virtually all costs, in our credit economy, will be affected…."[139]

As an alternative, or in addition, to lowering the HHI threshold, the DOJ could supplement its analyses with other concentration metrics. While widely considered to be a conceptual advancement over the four-firm concentration ratio previously used in bank antitrust, the HHI has nonetheless been subject to criticism.[140] Skeptics contend, for example, that the HHI undervalues smaller firms' competitive significance and is insufficiently sensitive to inequality in firms' market shares.[141] To mitigate the HHI's shortcomings, the DOJ could use other measures of concentration, such as the Hall-Tideman Index (HTI) or comprehensive industrial concentration index (CCI), in addition to the HHI.[142] If appropriately calibrated, these alternative metrics could augment the traditional HHI analysis and thereby help DOJ identify anticompetitive consolidation in the banking sector.

2. Deemphasize Mitigating Factors

In addition to reducing the HHI threshold, the DOJ should stop relying on mitigating factors in bank antitrust analysis. The banking agencies and the DOJ have frequently cited factors—including branch divestitures and potential market entry—as mitigating the potential anticompetitive effects of a bank merger. In practice, however, these purported mitigants do not significantly alleviate the harmful consequences of bank consolidation. Accordingly, the DOJ should place little weight on mitigating factors in future bank merger evaluations.

The Limits of Antitrust, 63 TEX. L. REV. 1, 3 (1984) (asserting that "judicial errors that tolerate baleful practices are self-correcting….").

[138] *See generally* Zaring, *supra* note 70, at 1441-46 (documenting dearth of de novo bank charters).

[139] United States v. Phila. Nat'l Bank, 374 U.S. 321, 372 (1963).

[140] *See, e.g.*, Jay Greenfield, *Beyond Herfindahl: Non-Structural Elements of Merger Analysis*, 53 ANTITRUST L.J. 229, 233 (1984) (discussing shortcomings of the HHI).

[141] *See, e.g.*, Michael O. Finkelstein & Richard M. Friedberg, *The Application of the Entropy Theory of Concentration to the Clayton Act*, 76 YALE L.J. 677, 707 (1967) (criticizing the HHI for understating the role of small competitors); Stephen A. Rhoades, *Market Share Inequality, the HHI, and Other Measures of the Firm-Composition of a Market*, 10 REV. INDUS. ORG. 657, 672-73 (1995) (concluding that the HHI undervalues market share inequality among competitors).

[142] *See* Jacob A. Bikker & Katharina Haaf, *Measures of Competition and Concentration in the Banking Industry: A Review of the Literature*, ECON. & FIN. MODELLING, Summer 2002, at 1, 6-17 (reviewing alternative concentration measures). The HTI resembles the HHI but weights the market shares of individual banks by their rankings within the market, thereby granting more significance to the total number of competitors. *See id.* at 9-10. The CCI "is the sum of the proportional share of the leading bank and the summation of the squares of the proportional sizes of each bank, weighted by a multiplier reflecting the proportional size of the rest of the industry." *Id.* at 11. The CCI is thus thought to reflect both the market share of a dominant firm and the dispersion of smaller competitors. *See id.*

One of the most common mitigating factors cited in bank antitrust—branch divestitures—appears to be of dubious societal value. When a proposed merger exceeds the 1800/200 HHI threshold, the banking agencies and the DOJ often require the merging banks to sell certain branches and their associated deposits as a condition of approval.[143] In theory, branch divestitures mitigate anticompetitive harms because they reduce the merged banks' presence in the market and bolster the acquirer's competitive position. In reality, however, divestitures have proven ineffective in maintaining the competitiveness of local banking markets. Despite having their accounts transferred to a new bank as part of a divestiture agreement, many customers—especially small businesses—voluntarily choose to remain with their original bank because of existing relationships with loan officers and other bank personnel.[144] As a result, merging banks often maintain their market shares notwithstanding branch divestitures, leading to anticompetitive outcomes.[145] Thus, although policymakers previously assumed that branch divestitures would neutralize the potential anticompetitive effects of a proposed bank merger, divestitures have proven to be an ineffective remedy, and the DOJ should therefore deemphasize them as a mitigating factor.

Another commonly-cited mitigating factor—a market's attractiveness for new entry—is equally unproven in alleviating the harms of bank consolidation. Under the Bank Merger Guidelines, the agencies may authorize a merger that exceeds the 1800/200 HHI threshold based on "expectations about potential entry by institutions not now in the market."[146] To evaluate a market's attractiveness for entry, the agencies consider recent de novo entry by out-of-market banks and demographic factors such as population growth rate and per capita income.[147] Attractiveness for entry is now "the most prominent mitigating factor cited when potentially anticompetitive consolidations are allowed."[148] However, the Federal Reserve's own research has cast doubt on the extent to which attractiveness for entry actually mitigates anticompetitive harms. Indeed, Federal Reserve economists have found that past entry and demographic variables are generally not correlated with—and thus not predictive of—future entry.[149] Even bank lobbyists acknowledge that attractiveness for entry is unproven as a mitigating factor.[150] In the future, therefore, the DOJ

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[143] For example, in 2019, the DOJ required BB&T and SunTrust to divest 28 branches and $2.3 billion in deposits as a condition of the banks' merger. *See* Press Release, Dep't of Just., Justice Department Requires Divestitures in Order for BB&T and SunTrust to Proceed with Merger (Nov. 8, 2019), https://www.justice.gov/opa/pr/justice-department-requires-divestitures-order-bbt-and-suntrust-proceed-merger.

[144] *See* Gam & Zhang, *supra* note 14, at 4-5 (analyzing bank mergers between 1999 and 2014); Liebersohn, *supra* note 105, at 37-40 (analyzing bank mergers between 1994 and 2017).

[145] *See* Gam & Zhang, *supra* note 14, at 4 ("[B]ank divestitures do not significantly change the local small business lending activities of either the merging or competing banks.… This finding suggests that antitrust divestitures are ineffective in maintain competitiveness in the small business lending market."); Liebersohn, *supra* note 105, at 37-40 (concluding that branch divestitures have no effect on the small business loan market).

[146] BANK MERGER GUIDELINES, *supra* note 123, at 3.

[147] *See, e.g.*, Centura Banks, Inc., 76 Fed. Rsrv. Bull. 869, 872 (1990).

[148] Robert M. Adams & Dean F. Amel, *The Effects of Past Entry, Market Consolidation, and Expansion by Incumbents on the Probability of Entry in Banking*, 48 REV. INDUS. ORG. 95, 96 (2016).

[149] *See Id.* at 117-118 (concluding that demographic variables are correlated with probability of entry only in extreme cases and that past bank entry is uncorrelated with new charter entry in rural markets).

[150] *See* Paul Calem & Gregg Rozansky, *Bank Merger Applications in Law and Practice*, BANK POL'Y INST. 8 (Aug. 19, 2021), https://bpi.com/wp-content/uploads/2021/08/Bank-Merger-Applications-in-Law-and-Practice.pdf ("[W]e

should discount a market's attractiveness for entry when evaluating a proposed merger's potential anticompetitive effects.

3. Evaluate Mix of Large and Small Institutions in a Market

As a supplement to the traditional HHI analysis, the DOJ should expressly consider the mix of large and small institutions that would remain in a market following a merger. The Bank Merger Guidelines' narrow focus on deposit-based HHIs obscures an important determinant of a market's competitive dynamics: the size of the competing banks. Small, locally-rooted community banks and large, multinational megabanks typically serve different customers, specialize in different products, and use different underwriting techniques.[151] Thus, two markets with identical deposit concentration metrics may nonetheless perform differently if one market is dominated by large banks and the other by small banks.[152] The HHI's blindness to competitors' size is part of the reason why large bank acquisitions of small firms often harm customers even when the HHI does not suggest the merger would be anticompetitive.[153] As former Federal Reserve Governor Jeremy Stein and coauthors have asserted, "The key issue might be not so much about banks having market power in the traditional Herfindahl-index sense but rather, the degree to which [customers] have choice over the size of the bank they do business with."[154]

To address this issue, the DOJ should affirmatively consider the mix of megabanks, regional banks, and community banks in a market in addition to the HHI and other concentration metrics. The OCC's bank merger framework from the 1960s provides a good model. After Congress adopted the Bank Merger Act, the OCC implemented a "balanced banking structure" approach to bank merger analysis.[155] This approach "stressed the range of bank size," and the OCC sought to ensure that "each market [w]ould have a range of small, medium and large banks."[156] Contemporary antitrust enforcers should implement a similar approach, striving to avoid mergers that would deprive a market of competition among banks of a certain size. This approach would subject transactions like First Citizens BancShares' 2020 acquisition of Entegra Bank to heightened scrutiny.[157] That deal eliminated Entegra—a small, $1.7 billion bank in southwest North Carolina—and left more than ninety-five percent of the deposits in one market controlled by

are not aware of any study assessing whether the use of th[e attractiveness for entry] criterion as a mitigating factor in merger decisions yielded the intended longer-term outcome.").

[151] *See* Allen N. Berger et al., *Does Function Follow Organizational Form? Evidence from the Lending Practices of Large and Small Banks*, 76 J. FIN. ECON. 237, 240-41 (2005) (documenting that smaller banks lend to smaller firms and use "softer" underwriting criteria than larger banks).

[152] *Cf.* Kwangwoo Park & George Pennacchi, *Harming Depositors and Helping Borrowers: The Disparate Impact of Bank Consolidation*, 22 REV. FIN. STUD. 1, 2 (2009) ("[A] greater presence of [large] banks tends to promote competition in retail loan markets but also tends to harm competition in retail deposit markets.").

[153] *See* Jeremy C. Kress, *Modernizing Bank Merger Review*, 37 YALE J. ON REGUL. 435, 465 (2020).

[154] Berger et al., *supra* note 151, at 266.

[155] Earl W. Kintner & Hugh C. Hansen, *A Review of the Law of Bank Mergers*, 14 B.C. INDUS. & COM. L. REV. 213, 223 (1972).

[156] *Id.*

[157] First Citizens BancShares, Inc., 106 Fed. Rsrv. Bull. 44 (2020).

medium and large banks.[158] Even though the relevant market's post-merger HHI was consistent with the 1800/200 threshold when accounting for mitigating factors, the lack of size diversity among the remaining banks threatens to impair competition, particularly for small business loans.[159] Accordingly, a more effective bank antitrust framework would evaluate the mix of large and small institutions in a market in addition to the HHI.

4. Consider Effects of Common Ownership

As a further enhancement to the bank antitrust framework, the DOJ should consider how common ownership of banks by institutional investors could affect post-merger competition in ways that are unobservable by the traditional HHI analysis. A growing body of literature has demonstrated that markets behave less competitively when institutional investors own sizeable stakes in competing firms.[160] Researchers have documented the anticompetitive consequences of common ownership in several industries, including banking.[161] A greater level of horizontal shareholding among banks in a local market is associated with higher prices for deposit products, independent of the market's HHI.[162] That is, when competing banks are owned by the same institutional investors, the banks are more likely to raise their prices. As Professors José Azar, Sahil Raina, and Martin Schmalz put it, "[W]ho owns the banks matters for how the banks compete."[163]

As currently implemented, however, the Bank Merger Guidelines ignore the role of common ownership in dictating a market's competitive dynamics. Thus, the prevailing approach to bank antitrust "greatly understate[s] the threat to competition when common ownership exists."[164] As Professor Einer Elhauge commented, "the failure to consider horizontal shareholding levels in past merger analysis may help explain why merger retrospectives have repeatedly found that agencies

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[158] After the transaction, more than ninety-five percent of the deposits in the Transylvania County banking market were controlled by First Citizens (36 percent), Wells Fargo (22 percent), United Community Bank (19 percent), Fifth Third Bank (11 percent), and PNC Bank (7 percent)—all of which had more than $20 billion in assets and were not headquartered locally. *See id.* at 48-49; Transylvania County, NC Banking Market, FED. RSRV. BANK OF ST. LOUIS CASSIDI (June 30, 2021), https://cassidi.stlouisfed.org/markets/37295/hhi.

[159] *See* First Citizens BancShares, Inc., *supra* note 157, at 48-49 (discussing the Transylvania County banking market's post-merger HHI); Berger et al., *supra* note 151, at 266 (assessing competitive consequences of markets that lack banks of varying sizes).

[160] *See generally* Martin C. Schmalz, *Recent Studies on Common Ownership, Firm Behavior, and Market Outcomes*, 66 ANTITRUST BULL. 12 (2021) (summarizing literature).

[161] *See* José Azar et al., *Ultimate Ownership and Bank Competition*, 51 FIN. MGMT. 1, 20-40 (2022) [hereinafter Azar et al., *Bank Competition*] (documenting anticompetitive consequences of common ownership in banking); José Azar et al., *Anticompetitive Effects of Common Ownership*, 73 J. FIN. 1513, 1528-51 (2018) (documenting anticompetitive consequences of common ownership in airline industry); Mohammad Torshizi & Jennifer Clapp, *Price Effects of Common Ownership in the Seed Sector*, 66 ANTITRUST BULL. 39, 57-64 (2021) (documenting anticompetitive consequences of common ownership in the corn, soy, and cotton seed industries); Jin Xie, *Horizontal Shareholdings and Paragraph IV Generic Entry in the U.S. Pharmaceutical Industry*, 66 ANTITRUST BULL. 100, 105-09 (2021) (documenting anticompetitive consequences of common ownership in the pharmaceutical industry).

[162] *See* Azar et al., *Bank Competition*, *supra* note 161, at 7.

[163] *Id.* at 40.

[164] Eric A. Posner et al., *A Proposal to Limit the Anticompetitive Power of Institutional Investors*, 81 ANTITRUST L.J. 669, 688 (2017).

and courts, despite their best efforts, have approved many mergers that (contrary to agency or court predictions) actually raised prices."[165]

To prevent anticompetitive outcomes, the DOJ should consider the extent of common ownership in a banking market when evaluating a proposed merger. The DOJ should closely scrutinize—and potentially challenge—mergers where the remaining competitors would have a high degree of horizontal shareholding.[166] This approach would subject transactions like BB&T's 2019 merger with SunTrust to closer investigation. The Federal Reserve calculated that the BB&T–SunTrust merger would increase the Atlanta, Georgia banking market's HHI by 270 points to 1743—just below the 1800/200 threshold for enhanced scrutiny.[167] However, the antitrust authorities overlooked that the four largest banks in Atlanta following the merger—controlling almost three-quarters of the market's deposits—would have a high degree of common ownership.[168] Thus, while the traditional HHI analysis indicated that the Atlanta market would remain competitive, a more probing analysis of the competitors' common ownership may have revealed the potential for anticompetitive conduct. To alleviate common ownership's anticompetitive consequences in the future, therefore, the DOJ should evaluate the extent of horizontal shareholding as part of its merger analyses.

B. Expanding the Aperture: Considering Non-Price Competitive Harms

Even with stronger analytical tools, however, an antitrust framework based exclusively or primarily on the HHI (or similar metrics) will not prevent harmful bank consolidation. That is because excessive bank concentration inflicts numerous societal costs that an HHI-focused approach ignores. As documented above, bank consolidation diminishes product quality, increases entry barriers, and intensifies macroeconomic fragility—yet the Bank Merger Guidelines fail to grapple with these broader harms. To better protect the public, therefore, the DOJ should renounce its narrow focus on the HHI in favor of a more complete analysis of the numerous non-price harms that bank consolidation threatens to impose. Below, I sketch out how the DOJ could incorporate non-price considerations into its bank merger analyses and thereby shield the public from the broader costs of excessive financial sector concentration.

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[165] Einer Elhauge, *How Horizontal Shareholding Harms Our Economy—Andy Why Antitrust Law Can Fix It*, 10 HARV. BUS. L. REV. 207, 280 (2020).

[166] Concentration metrics that reflect competitors' overlapping ownership—such as the "generalized HHI" developed by Professors Azar, Raina, and Schmalz—can help identify markets where horizontal shareholding may lead to anticompetitive conduct. Azar et al., *Bank Competition*, *supra* note 161, at 16.

[167] *See* BB&T Corp., 106 Fed. Rsrv. Bull. 1, 8 (2020) (assessing Atlanta banking market HHI with mitigating factors).

[168] The banks—Wells Fargo, Truist (the new name of the combined BB&T-SunTrust), Bank of America, and JPMorgan—all had Vanguard, BlackRock, and State Street among their top four shareholders, collectively owning between 18 and 21 percent of each bank. *See* Wells Fargo & Co.: Top Institutional Holders, YAHOO! FIN., https://finance.yahoo.com/quote/WFC/holders?p=WFC (last visited Jan. 18, 2022); Truist Fin. Corp., YAHOO! FIN., https://finance.yahoo.com/quote/TFC/holders?p=TFC (last visited Jan. 18, 2022); Bank of Am.: Top Institutional Holders, YAHOO! FIN., https://finance.yahoo.com/quote/BAC/holders?p=BAC (last visited Jan. 18, 2022); JPMorgan Chase & Co.: Top Institutional Holders, YAHOO! FIN., https://finance.yahoo.com/quote/JPM/holders?p=JPM (last visited Jan. 18, 2022).

As an initial matter, preventing non-price competitive harms is firmly within the DOJ's statutory remit. As Professors Lina Khan and Tim Wu have documented, the U.S. antitrust laws were originally designed to protect not only a broad array of consumer interests but also far-reaching societal priorities including the preservation of open markets and system stability.[169] The antitrust laws, as initially understood, sought to prevent extreme concentrations of economic and political power that could distort not only free enterprise but also democracy itself.[170] Although the DOJ has narrowed antitrust's focus to consumer prices and efficiency, this circumscribed approach is neither required nor supported by statute.[171] To the contrary, history suggests that Congress intended antitrust enforcers and courts to adopt expansive interpretations of the ways in which market concentration impairs economic and political liberties.[172]

To faithfully effectuate antitrust policy, therefore, the DOJ must consider non-price competitive harms such as market distortions created by the "too-big-to-fail" subsidy. As discussed above, certain large banks benefit from a perception that the government would bail them out if they were to experience economic distress.[173] This perception enables "too-big-to-fail" banks to borrow at favorable rates relative to smaller competitors, thereby granting big banks a competitive advantage and deterring new entrants.[174] Despite evidence that large mergers exacerbate the "too-big-to-fail" subsidy, however, "antitrust enforcers and courts d[o] not account for … the competitive distortions in creating [too-big-to-fail] firms."[175] Going forward, the DOJ should routinely perform econometric analyses to assess whether a bank would accrue a new or expanded "too-big-to-fail" subsidy following a proposed merger. If models suggest that a merger such as BB&T's combination with SunTrust would enlarge the "too-big-to-fail" subsidy, the DOJ should challenge the merger to prevent further competitive distortions.

The DOJ could further bolster its analysis by considering impairments in product quality likely to stem from a bank merger, including branch closures. To evaluate potential deterioration in product quality, the DOJ should require merging banks to disclose planned branch closures during the antitrust review process instead of waiting until after consummation of the merger, as is current practice.[176] Once disclosed, the DOJ should assess the extent to which an applicant's proposed branch closures would inconvenience consumers and deprive communities of financial services,

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[169] *See* Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 737-46 (2017); TIM WU, THE CURSE OF BIGNESS 78-83 (2018).

[170] *See* Khan, *supra* note 169, at 740; WU, *supra* note 169, at 81-83; Robert Pitofksy, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1060-65 (1979).

[171] *See* Khan, *supra* note 169, at 739 ("Legislative history reveals that the idea that Congress designed the Sherman Act as a consumer welfare prescription is wrong.") (internal citations omitted).

[172] *See, e.g.*, Pitofsky, *supra* note 170, at 1060-65.

[173] *See supra* Section II.B.2.

[174] *See supra* notes 65-67 and accompanying text.

[175] Maurice E. Stucke, *Occupy Wall Street and Antitrust*, 85 S. CAL. L. REV. POSTSCRIPT 33, 49 (2012).

[176] *See, e.g.*, Letter from Patricia A. Robinson, Of Counsel, Wachtell, Lipton, Rosen & Katz, to Adam M. Drimer, Assistant Vice President, Fed. Rsrv. Bank of Richmond A-2–A-5 (Apr. 16, 2019), https://www.federalreserve.gov/files/Additional-Information-Response-20190416.pdf (declining to disclose BB&T's and SunTrust's anticipated post-merger branch closures).

with heightened scrutiny of planned branch closures in LMI areas. In addition to branch closures, the DOJ should assess whether a proposed merger might impair customer service or threaten consumer privacy. At a minimum, these potential diminishments in product quality should be weighed against any purported public benefits that might result from a proposed merger.[177] In addition, as part of the antitrust review process, the DOJ could seek commitments from a merging bank not to curtail certain services or sell consumers' personal data.

In addition to distortive subsidies and product quality, the DOJ ought to consider macroeconomic resilience when reviewing a proposed merger. As discussed above, bank consolidation may threaten competition by intensifying risks to financial stability.[178] After the 2008 financial crisis, Congress amended the bank merger statutes to instruct the federal banking agencies to assess whether a proposed merger "would result in greater or more concentrated risks to the stability of the United States banking or financial system."[179] To date, however, the banking agencies' financial stability analyses have been conceptually rudimentary and permissive of large bank mergers.[180] In the absence of effective financial stability analyses by the banking agencies, the DOJ should incorporate financial stability into its antitrust reviews to prevent systemically risky mergers that could inflict severe economic damage and diminish competition throughout the economy. Numerous empirical metrics for assessing systemic risk already exist—such as the Basel Committee on Bank Supervision's "global systemically important bank" score—and could inform the DOJ's financial stability assessments.[181]

More broadly, the DOJ should take into account the full macroeconomic consequences of bank consolidation when making antitrust enforcement decisions. As discussed above, consolidation in the banking sector hastens consolidation throughout the economy.[182] Larger banks lend to larger businesses, thereby favoring incumbent firms, cutting off funding for new entrants, and impairing competition.[183] Bank mergers, in turn, are associated with less competitive labor markets throughout the economy.[184] Accelerating bank concentration also impedes monetary policy transmission and limits the Federal Reserve's ability to stimulate economic activity when conditions warrant.[185] Moreover, "financialization"—when finance constitutes an increasingly large proportion of a country's economy—is associated with declining productivity and increased

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[177] *See supra* notes 130-133 and accompanying text (noting that antitrust enforcers may authorize an otherwise anticompetitive bank merger if its public benefits outweigh its anticompetitive effects).

[178] *See supra* Section III.B.3.b.

[179] 12 U.S.C. §§ 1828(c)(5), 1842(c)(7).

[180] *See* Kress, *supra* note 153, at 470-71 (critiquing the banking agencies' financial stability analyses).

[181] *See id.* at 472-75.

[182] *See supra* note 4 and accompanying text.

[183] *See id.*

[184] *See supra* notes 31-32; *see also* Suresh Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 572-95 (2018) (urging antitrust enforcers to review labor-market effects of proposed mergers).

[185] *See supra See supra* notes 72-74 and accompanying text.

economic inequality.[186] Going forward, therefore, bank consolidation's far-reaching anticompetitive consequences should inform the intensity of bank antitrust enforcement, and preventing excessive bank concentration ought to be a top priority of the broader antimonopoly agenda.

Finally, beyond the direct economic consequences of bank consolidation, the DOJ should remain cognizant of political economy when making antitrust enforcement decisions. Bank consolidation threatens to distort the democratic process through large banks' legislative and regulatory lobbying, "revolving door" hiring practices, and sizeable political donations.[187] As Professor Art Wilmarth has documented, big banks' "political influence has expanded along with the growing significance of the financial sector in the U.S. economy."[188] Concentrating additional economic and political power in large banks may therefore lead to further distortions of public policy that facilitate banks' rent-seeking and impair broader societal interests. Preventing this type of distortion in the democratic process is a foundational tenet of U.S. antitrust law and should therefore guide DOJ's enforcement in the future.[189]

Thank you again for the opportunity to comment on the Bank Merger Guidelines. Please let me know if I can provide any additional information.

Sincerely,

Jeremy C. Kress
Assistant Professor of Business Law
Co-Faculty Director, Center on Finance, Law & Policy

[186] *See* Stephen G. Cecchetti & Enisse Kharroubi, *Reassessing the Impact of Finance on Growth* 14 (Bank for Int'l Settlements, Working Paper No. 381, 2012), https://www.bis.org/publ/work381.pdf (concluding that, past a certain point, large financial sectors are associated with lower economic productivity).

[187] *See* Arthur E. Wilmarth, Jr., *Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 U. CIN. L. REV. 1283, 1363-69 (2013).

[188] *Id.* at 1283-84.

[189] *See, e.g.*, Pitofsky, *supra* note 170, at 1060-65 (discussing the political origins of antitrust).