American Bankers Association
Building Success. Together.

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Via Electronic Mail

United States Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

February 15, 2022

RE: Request for Public Comment: US Department of Justice Antitrust Division Bank Merger Guidelines Review (Request)[1]

Ladies and Gentlemen:

The American Bankers Association (ABA)[2] appreciates this opportunity to provide additional views of our members to the Department of Justice Antitrust Division (Division) during its review of the 1995 Bank Merger Competitive Review Guidelines (Banking Guidelines).[3] ABA's members comprise the entire range of the US banking industry and compete vigorously in diverse product and geographic markets to serve their customers. As noted in ABA's 2020 Response, preserving this diversity and enhancing delivery of financial services to the national economy is a central concern of both our industry and our nation's public policy.

ABA continues to believe that a review of the Banking Guidelines, whose current form is now 25 years old, is important to the health of the US financial system and economy. In the intervening years, the market for financial products and services has undergone tremendous change, thanks to the rise of both availability and use of online banking,[4] the interstate expansion of bank branch networks,[5] enhanced market access made possible by advertising and communication innovations, and the increased market presence of nonbank financial firms, including "fintechs."

[1] *See* https://www.justice.gov/opa/pr/antitrust-division-seeks-additional-public-comments-bank-merger-competitive-analysis, December 17, 2021.
[2] The American Bankers Association is the voice of the nation's $22.8 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard nearly $19 trillion in deposits and extend $11 trillion in loans.
[3] ABA previously provided comments, available here (2020 Response), in response to the Division's September 1, 2020 request for comment.
[4] According to a FICO report, 80% of millennials use digital banking to check their account balance, 76% use digital banking to check their accounts for fraudulent charges and 65% use digital channels to make external transfers. *See* Millennial Banking Insights and Opportunities, FICO (2014)(Retrieved from www.fico.com).
[5] Interstate branching was liberalized under the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Public Law No: 103-328 (108 Stat. 2338; Date: 9/29/94).

As noted in our 2020 Response, because of these significant changes in the financial services market, the current Banking Guidelines fail to account for significant competition in many product lines, including in many rural markets. More generally, we refer the Division to that submission for a more extensive discussion of its key points:

- Joint guidance adopted by both the Division and the Federal banking agencies is very useful because it is based on a consistency in approach of the agencies having jurisdiction over analysis of competitive impacts of mergers.

- Reconciliation of conflicting standards between the Banking Guidelines and the more general Horizontal Merger Guidelines is necessary and appropriate.[6] More specifically, in 2010 the Division (and the Federal Trade Commission) raised the concentration threshold from which competitive harm was presumed for every industry except the banking industry. In addressing this conflict, the Division should raise to 2500 the threshold of the Herfindahl-Hirschman Index (HHI) below which the Division would generally not challenge proposed mergers or require divestitures of branches or other operations, consistent with the threshold currently applicable to all other industries under the 2010 Horizontal Merger Guidelines.

- Competitive impact analysis should take into account financial services provided to a market through channels other than branch networks, and by nonbank firms
    - Online delivery of financial services by banks without a branch presence, including online mortgage companies and other online lending services;
    - Money-market funds (which are direct competitors for bank deposits);
    - Farm Credit System institutions, thrift institutions, and credit unions; and
    - Fintechs and other nonbank firms, which frequently unbundle financial services traditionally provided by banks through physical branches.

Market definitions based primarily on bank branch networks omit consideration of these critical features of product markets and customer groups in which banks operate. Any market definition should allow these additional factors to be taken into account in assessing the relevant competitive environment. In some merger applications banks have already used additional data to document such market penetration:

- Data gathered pursuant to the Home Mortgage Disclosure Act (HMDA)[7] and the Community Reinvestment Act (CRA)[8] could be used to show market activity conducted other than through branches; and
- Evidence from traffic patterns could show customer use of services in wider areas.

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[6] *See* https://www.justice.gov/atr/horizontal-merger-guidelines-08192010#4

[7] Codified at 12 USC §2801 *et seq.*

[8] Codified at 12 USC §2901 *et seq.*

The Division should encourage the inclusion of this and similar relevant information in merger applications when appropriate to provide a more accurate picture of current market conditions.

In addition, small-business loan data under the Small Business Administration's "Paycheck Protection Program" (PPP) offers additional evidence of competition from nonbank firms without branch presence in the market. See **Appendix A.** ABA notes that PPP loans are unusual in several respects, especially as they were originated under a novel program that was ramped up very quickly and could be forgiven if borrowers met certain program requirements. Though arguably not typical of small-business lending generally, PPP loans do demonstrate how quickly nonbank lenders (and likely lenders more generally) can offer loan products online, and how quickly small-business borrowers can adapt to and use such channels.

Additional Issues: Developments in the Financial and Regulatory Landscape

Since ABA submitted our 2020 Response, the debate over the appropriate standards for assessing bank mergers has grown sharper, and some misconceptions gained traction as part of the public dialogue. ABA believes it is important to correct those misconceptions.

Bank Mergers Often Preserve Customer Choices That Market Forces Might Otherwise Constrict

Though industry consolidation has been a recurring theme in recent decades,[9] there are many drivers of this trend, and in some cases a merger transaction may blunt the impacts of these trends. For example, as Federal Reserve Chair Powell noted recently in his confirmation hearing,[10] many rural counties have experienced serious population loss, and in many cases the bank(s) in those markets have faced severe pressure to meet fixed costs (regulation, technology investment, cybersecurity, and others) to continue servicing a shrinking customer base. In such cases a merger with another institution is often the best way to preserve banking services to the remaining customers and avoid losing entirely the bank's presence in the market. Indeed, in 1995 (the year the current Banking Guidelines were adopted) the Assistant Attorney General in charge of the Antitrust Division noted that "[t]o the extent that a bank merger allows the merging firms to achieve significant economies of scale or scope, consumers may benefit from lower costs and/or improved services, and our competitive analysis takes into account such factors."[11] Moreover, if the additional competitive factors noted in the 2020 Response are taken into account, such transactions could become feasible for community banks in circumstances that the current Banking Guidelines would discourage or prohibit. As Chair Powell noted, the driving

[9] *See, e.g.,* Federal Reserve Bank of Cleveland, "Has Bank Consolidation Changed People's Access to a Full-Service Bank Branch?" (October 6, 2021), *available at* https://www.clevelandfed.org/en/newsroom-and-events/publications/community-development-briefs/db-20211006-has-bank-consolidation-changed-peoples-access.aspx#:~:text=Consolidation%E2%80%94the%20combining%20of%20banking,(Rhoades%2C%201996%3B%20Adams%2C.

[10] *See* https://www.c-span.org/video/?517047-1/federal-reserve-chair-confirmation-hearing, Response to Senator Smith at 1:58:06.

[11] Anne K. Bingaman, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Antitrust and Banking* (Nov. 16, 1995) (https://www.justice.gov/atr/speech/antitrust-and-banking).

forces in such a situation are demographics and technological and regulatory demands, and a merger transaction will be the bank's best option in some cases. The need for and expenses of technology investment, not just for business efficiency, but also for enhancing customer service and maintaining robust cybersecurity, raise the same questions across banking markets broadly as all banks must achieve economies of scale or scope to enable high fixed cost investments now required to compete.

Any Review of the Banking Guidelines Should Adhere Strictly to the Division's Statutory Scope of Responsibilities

If the Division decides to move forward with updating the Banking Guidelines, it must publish any proposal for public comment. Both the requirements of the Administrative Procedure Act[12] and the critical public interest in the issues at stake make the opportunity for public review and input essential.

ABA notes also that an assessment of a merger's impact on financial stability is not part of the Division's statutory responsibilities in assessing bank merger transactions. ABA maintains an ongoing dialogue with the Federal banking agencies to address financial stability concerns, and as we participate in those agencies' consideration of updates to their bank merger policies, we will address any appropriate updates to their statutory consideration of financial stability implications.

Conclusion

As noted in our 2020 Response, under current application of the Banking Guidelines, small institutions may be prevented from merging if the government assumes they are the only competitors in their geographic markets, as the Division and the bank regulatory agencies define those markets. This outdated conception fails to reflect the competitive impact of online channels and other means of delivering financial services that do not depend on physical branch networks and are not captured by current competitive analyses. A more comprehensive analysis of these competitive factors will provide an accurate picture of products and services available to customers and promote a healthy market and economy.

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Thank you for the opportunity to express our views on these important issues. Should you have any questions, please do not hesitate to contact the undersigned at hbenton@aba.com.

Very truly yours,

/s/

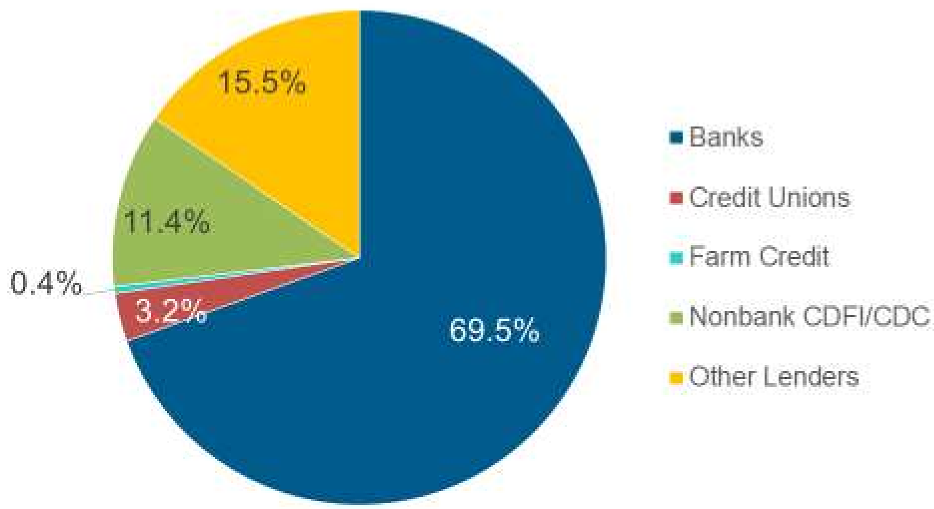
Hu A. Benton
Senior Vice President and Policy Counsel

[12] 5 USC §551 *et seq.*

APPENDIX A

Nonbanks Originated 3 in 10 PPP Loans

Through all rounds of the Paycheck Protection Program, nonbanks originated 3.6 million of the total 11.8 million loans delivered to small businesses



Source: SBA, data published June 8, 2021, ABA analysis

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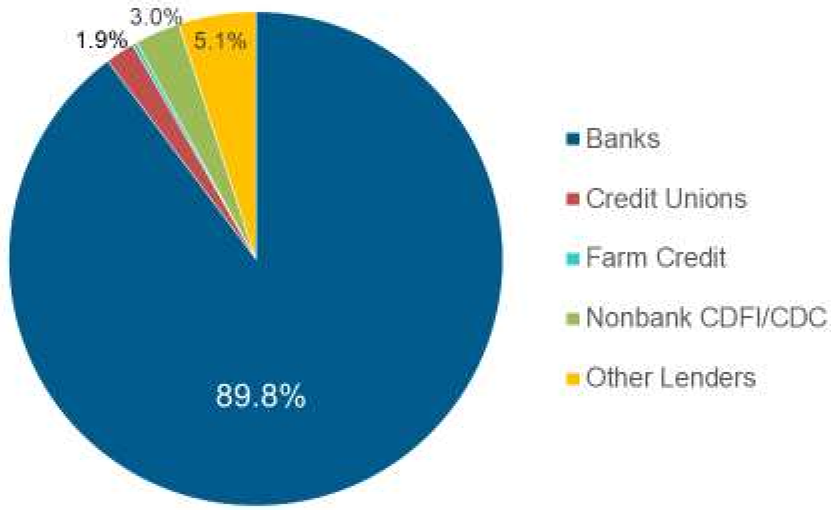
Nonbanks Delivered $82 Billion in PPP Loans

Through all rounds of the Paycheck Protection Program, nonbanks originated over 10% of the funds that were delivered to small businesses



Source: SBA, data published June 8, 2021, ABA analysis

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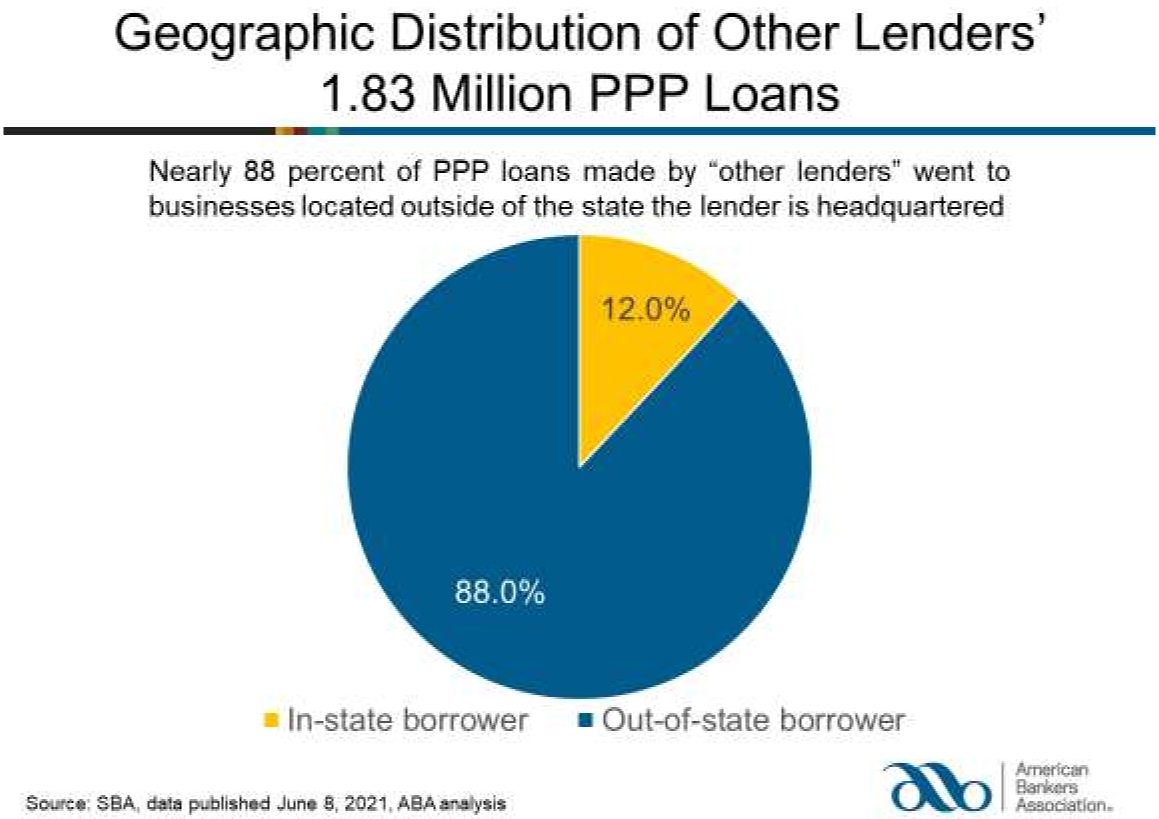
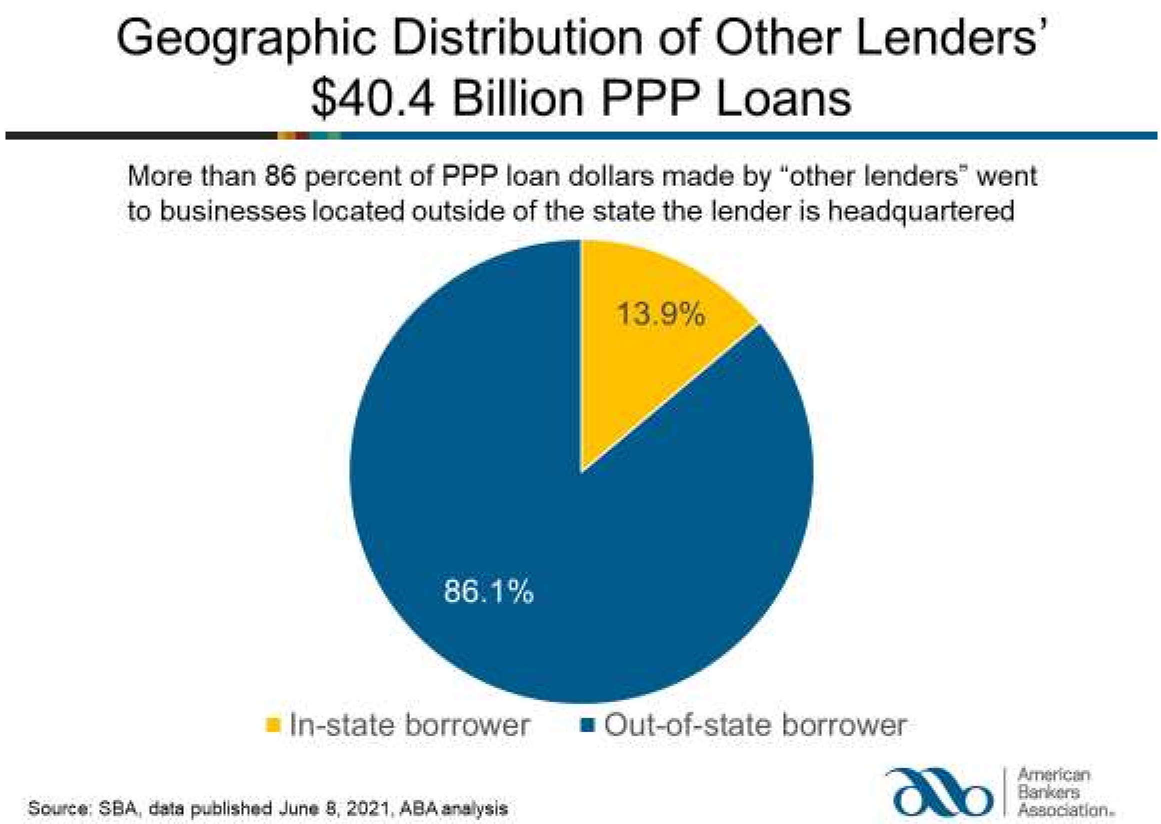


(Reflects lending by firms other than banks, credit unions, Farm Credit System institutions, CDFIs, and CDCs.)



(Reflects lending by firms other than banks, credit unions, Farm Credit System institutions, CDFIs, and CDCs.)