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February 15, 2022

## Comments to the Department of Justice's Antitrust Division on Whether and How It Should Revise the 1995 Bank Merger Competitive Review Guidelines

Dear Assistant Attorney General Kanter:

On behalf of one or more bank holding company clients, we submit this letter in response to the December 17, 2021 request of the Department of Justice's Antitrust Division ("Division") for additional comments on whether and how it should revise the 1995 Bank Merger Competitive Review Guidelines (the "Banking Guidelines").<sup>1</sup>

### **Introduction and Summary of Recommendations**

The Division initially requested public comment on the Banking Guidelines on September 1, 2020 with six specific questions, including whether the 1800/200 Herfindahl-Hirschman Index ("HHI") screen should be updated.<sup>2</sup> On December 17, 2021, the Division announced that it was seeking additional public comments until February 15, 2022.<sup>3</sup> In the announcement, the Division said, "[t]he division will use additional comments to ensure that the Banking Guidelines *reflect current economic*

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<sup>1</sup> U.S. Dep't of Justice, *Bank Merger Competitive Review – Introduction and Overview* (1995) [hereinafter the "Banking Guidelines"], <https://www.justice.gov/atr/bank-merger-competitive-review-introduction-and-overview-1995>.

<sup>2</sup> U.S. Dep't of Justice, *Antitrust Division Seeks Public Comments on Updating Bank Merger Review Analysis* (Sep. 1, 2020), <https://www.justice.gov/opa/pr/antitrust-division-seeks-public-comments-updating-bank-merger-review-analysis>.

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

*realities* and empirical learning, ensure Americans have choices among financial institutions, and guard against the accumulation of market power”.<sup>4</sup> Among other things, the updated call for comments asked whether—and in what way—the data submission requirements for the Federal Deposit Insurance Corporation’s (“FDIC”) Summary of Deposits (the “SOD”) should be updated to assist the competitive review of bank mergers.

We submit that the data submission requirements for the SOD should be updated as described below to improve the quality, accuracy and consistency of the SOD data used to calculate the HHI and to help ensure that the Banking Guidelines appropriately reflect the economic realities and competitive landscape of the banking industry today. Beyond the Banking Guidelines, modernizing the SOD also will have the effect of generating a comprehensive, publicly available dataset that may be used more broadly in academic studies and other types of research to further advance the banking industry in the future. Specifically, we request that the SOD Reporting Instructions (“SOD Instructions”), through a notice and comment process, be amended to:

- Require all reporting institutions to use a single method of assigning deposits to each office;
- Select a method for assigning deposits that results in a relatively stable deposit location across time;
- Require all reporting institutions to assign online deposits to a location related to the customer’s location;
- Ensure all FDIC-insured institutions, including FDIC-insured digital banks, are reporting institutions; and
- Tag corporate deposits.

It would likely take additional time and other resources for insured depository institutions to implement the changes we request to the SOD Instructions. To consider this issue fully, therefore, the FDIC should implement the requested changes after considering public comment as well as the costs and benefits associated with reasonable alternative methods.<sup>5</sup>

## **Background**

The SOD is an annual survey of branch office deposits. The data is collected as of June 30 and is required to be submitted by all FDIC-insured institutions with branch offices, including insured U.S. branches of foreign banks.<sup>6</sup> Institutions with no branch

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<sup>4</sup> *Id.* (emphasis added).

<sup>5</sup> We note that the FDIC has engaged in a similar notice and comment process with respect to the SOD before. *See, e.g.*, 85 Fed. Reg. 20688 (April 14, 2020).

<sup>6</sup> FDIC, *Summary of Deposits (SOD) - Annual Survey of Branch Office Deposits*, <https://www.fdic.gov/regulations/resources/call/sod.html>.

office are exempt from the reporting requirements, but are included in the survey based on the total deposits reported on their June Call Report.<sup>7</sup>

According to the FDIC, the SOD has been conducted since 1934,<sup>8</sup> and thus was not specifically designed for the Banking Guidelines. However, the data collected in the SOD is a useful proxy for the size of an institution's presence in different banking markets and has been used by regulators in the past primarily, although not exclusively, to conduct examinations and perform competitive analysis in local banking markets.<sup>9</sup> More broadly and for the public, the online tool includes historical data dating back to 1994 and allows users to locate branches in a geographic area (by state, county, ZIP code, or Metropolitan Statistical Area ("MSA")), identify the dollar value of deposits at each branch, and create custom "Deposit Market Share Reports".<sup>10</sup>

Relevant to the Banking Guidelines, data from the SOD is the primary source of data used to construct market shares and HHIs for local banking markets.<sup>11</sup> HHIs are used in the screening program outlined in the Banking Guidelines and the 2014 FAQs to identify proposed mergers that clearly do not have significant adverse effects on competition.<sup>12</sup> While the screening may take into account additional information at different stages in the process to establish a clearer picture of the competitive market, the HHIs (and through the HHIs, the deposit data from the SOD), remain a foundational basis of the analysis of whether certain mergers are anticompetitive. Deposit data from the SOD are used on the thesis that, because deposit accounts are widely held by consumers and small businesses and are held in combination with other commercial banking products, branch deposits are a reasonable indicator of the level of activity of a depository institution and therefore a proxy for presence in any particular region.<sup>13</sup>

The usefulness of this proxy has been recognized not only in the context of analyzing the competitive effects of mergers, but also in other contexts, including, for example, research on the banking industry, such as studies focused on branch

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<sup>7</sup> FDIC, *Summary of Deposits Reporting Instructions* (June 30, 2021), <https://www.fdic.gov/regulations/resources/call/sod/sod-instructions.pdf>.

<sup>8</sup> *Id.*

<sup>9</sup> See, e.g., Bd. of Governors of the Fed. Rsrv. Sys., *Bank of America - FleetBoston, Order Approving The Merger of Bank Holding Companies*, n.12 (2004), <https://www.federalreserve.gov/boarddocs/press/orders/2004/20040308/attachment.pdf>.

<sup>10</sup> FDIC, *Deposit Market Share Reports - Summary of Deposits*, <https://www7.fdic.gov/sod/sodMarketBank.asp?barItem=2>.

<sup>11</sup> Bd. of Governors of the Fed. Rsrv. Sys., *How do the Federal Reserve and the U.S. Department of Justice, Antitrust Division, analyze the competitive effects of mergers and acquisitions under the Bank Holding Company Act, the Bank Merger Act and the Home Owners' Loan Act?* (2014) [hereinafter the "2014 FAQs"], Q11, <https://www.justice.gov/sites/default/files/atr/legacy/2014/10/09/308893.pdf>.

<sup>12</sup> 2014 FAQs; Banking Guidelines.

<sup>13</sup> 2014 FAQs, Q11.

performance, failing banks and the lending market.<sup>14</sup> The Federal Reserve has also used SOD data in the past as an approximation of nationwide deposits.<sup>15</sup>

However, as with any calculation, the results of market share and HHI calculations are only as useful as the data that it uses. Thus, the SOD data should accurately, comprehensively and consistently reflect the competition that exists in every geographic market. Otherwise, such measures will not be an accurate reflection of “current economic realities”.

### **SOD Instructions Should Be Revised To Ensure Data Consistency Across Reporting Institutions and Across Time**

For the reasons discussed below, we respectfully submit that the SOD data submission requirements should be revised to:

- Require all reporting institutions<sup>16</sup> to use a single method of assigning deposits to each office; and
- Designate a method for assigning deposits that results in a relatively stable deposit location across time, such as assigning deposits to the office in closest proximity to the account holder’s address at the time when an account was opened.

The current SOD Instructions do not ensure that deposit data is reported consistently across institutions. The instructions only provide that reporting institutions should assign deposits to each office “in a manner consistent with their existing internal record-keeping practices”, such as deposits assigned to the office in closest proximity to the accountholder’s address; deposits assigned to the office where the account is most active; deposits assigned to the office where the account was opened; and deposits assigned to offices for branch manager compensation or similar purposes.<sup>17</sup>

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<sup>14</sup> See, e.g., 85 Fed. Reg. 66410, 66417 (Oct. 19, 2020) (identifying “deposits data gaps” as making it difficult to assess the impact of a deposit-based assessment area for Community Reinvestment Act requirements); Ken Onishi, *Local Concentration in the Small Business Lending Market and Its Relationship to the Deposit Market*, FEDS Notes (2021), <https://www.federalreserve.gov/econres/notes/feds-notes/local-concentration-in-the-small-business-lending-market-and-its-relationship-to-the-deposit-market-20210824.htm>; Christopher Martin, Manju Puri, and Alexander Ufier, *Deposit Inflows and Outflows in Failing Banks: The Role of Deposit Insurance* (2018), <https://www.fdic.gov/analysis/cfr/bank-research-conference/annual-18th/26-ufier.pdf>; Beverly Hirtle, *The Impact of Network Size on Bank Branch Performance*, Federal Reserve Bank of New York (2007), [https://www.newyorkfed.org/medialibrary/media/research/economists/hirtle/branching\\_paper\\_JBF\\_Final.pdf](https://www.newyorkfed.org/medialibrary/media/research/economists/hirtle/branching_paper_JBF_Final.pdf).

<sup>15</sup> See *supra* n. 9.

<sup>16</sup> As described in the immediately following section discussing online deposits, some FDIC-insured institutions are not currently required to submit an annual SOD survey to report additional information that is not included in their Call Report. Such institutions should be required to file the survey under the SOD Instructions, as contemplated to be modified by this letter. See *infra* note 20 and accompanying text.

<sup>17</sup> SOD Instructions at 3.

In fact, reporting options are not limited to these four or even to the institution's internal record-keeping practices; the only choice of reporting method that the SOD Instructions prohibit is one that both diverges from the institution's internal record-keeping systems *and* grossly misstates or distorts the deposit-gathering activity of an office.<sup>18</sup> Given that institutions are permitted to use a wide variety of different methods to assign and report deposits, the data submission requirements of the SOD do not result in comparable datasets among reporting institutions. Nonetheless, the data are aggregated and presented as a single, comprehensive dataset in the SOD system and, accordingly, HHI analyses and other applications of the data are unable to account for such variation.

Moreover, the SOD Instructions also provide that institutions may consolidate the deposits of certain limited service offices, such as military, drive-through and mobile/seasonal offices, with other offices. Without further proscription, institutions may apply this method inconsistently, creating further noise in the data that is collected.

When designating a deposit assignment method as described above, the method should not be sensitive to changes in other variables over time, such as seasonal account activity or branch manager compensation. Such a reporting method should reduce the burden on institutions of tracking and maintaining information as well as reduce the variability in data over time.<sup>19</sup> For example, assigning deposits to the office in closest proximity to the account holder's address at the time when an account was opened would help ensure that banks are not required to change the location of deposit frequently and that data are not based on variables that are irrelevant to competitive analysis.

### **SOD Instructions Should Require Online Deposits Be Appropriately Measured To Better Reflect Economic Realities**

For the reasons discussed below, we respectfully submit that the SOD Instructions should be revised to require all FDIC-insured institutions, including those with no branch office and those with a digital-only presence, to complete the SOD survey.<sup>20</sup> Moreover, FDIC-insured institutions should be required to assign online deposits (including deposits generated through a website or mobile application) to a location related to the customer's

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<sup>18</sup> *Id.* ("However, deposit allocations that diverge from the financial institution's internal record-keeping systems *and* grossly misstate or distort the deposit gathering activity of an office should not be utilized.") (emphasis added).

<sup>19</sup> Other commenters have noted the limits of the "snapshot" nature of the SOD data in competitive analyses. Reducing the number of variables that are measured by the data at the time of the "snapshot" might mitigate, although it would not eliminate, this limitation of the SOD data.

<sup>20</sup> Unit banks and thrifts (institutions that have a main office only) are exempt from filing the SOD survey. SOD Instructions at 1. We submit that any additional costs or burdens for such institutions would be outweighed by the potential benefits associated with more accurate SOD data, including benefits to HHI analysis. In addition, imposing consistent reporting requirements across a broader range of insured institutions also should reduce barriers to opening physical branches.

location (rather than permitting what we understand to be the general practice currently of assigning such digital deposits to a so-called “cyber branch” near the main office or headquarters of the banking organization).

The SOD data submission requirements do little to address banking business models that do not rely on physical deposit branches. As noted above, the SOD Instructions exempt institutions with no branch office from the reporting requirements, causing such institutions’ total deposits (based on the total deposits of their June Call Report) to be attributed to their main office. In addition, so-called “cyber branches” are categorized as a full-service, “home banking” office in the SOD Instructions. For these offices, institutions are instructed to only report the “city, state, ZIP code and county of the operations center that performs the back room operations associated with this activity”.<sup>21</sup> Assignment of all online deposits to one location, often far from the location of the customer, results in overcounting of deposits in the location of the bank’s operation center and undercounting of deposits in the locations where customers are actually served. We therefore respectfully submit that this instruction should be modified.

Both the Division and Federal Reserve appear to be aware of this issue, as the 2014 FAQs state that “[d]eposits of Internet banks are generally not included in local market share calculations, because it is not possible, *given current data*, to determine where the depositors of such banks are located” (emphasis added). Similar concerns have also been raised in the context of central booking.<sup>22</sup>

Modernizing the SOD data submission requirements to require appropriate reporting of online deposits would provide the Division with data that better reflect current economic realities, including activities of digital banks and the digital banking activities of traditional banks. According to statistics reported by PwC, “direct” or digital banks made up approximately 20% of the market share of consumer’s primary banks in 2021, in line with regional banks and community banks, which made up 20% and 18%, respectively.<sup>23</sup> These statistics also evidence a trend toward increased digital banking.<sup>24</sup> Therefore, the accuracy of SOP data likely will fall farther behind if it is not modernized to reflect current trends fueled by technological advancements and consumer preferences.

To better measure the digital presence of an institution in a geographic area, the SOD could be revised to require all institutions to attribute deposits to a “cyber branch” (or existing branch, if one exists for the reporting institution) in the Federal Reserve defined geographic market or, at a minimum, in the state where deposit account holders

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<sup>21</sup> SOD Instructions at 33.

<sup>22</sup> 2014 FAQs, Q23.

<sup>23</sup> PwC, *PwC’s 2021 Digital Banking Consumer Survey*, <https://www.pwc.com/us/en/industries/banking-capital-markets/library/digital-banking-consumer-survey.html>.

<sup>24</sup> For example, the PwC statistics show that digital banks captured more than 10% of the market share, apparently from regional banks and community banks, in just a little over three years. *Id.*

are located. For example, institutions could be instructed to assign online deposits to the cyber or other branch that is located in the local banking market of the account holder's address at the time when an account was opened.

Of course, adopting such reporting requirements could result in some incremental increase in the reporting burden on FDIC-insured institutions; however, the benefits of more accurate and detailed publicly available data for banking institutions, their regulators and others will reduce inefficiencies and help financial institutions reach communities that are, in fact, underserved, but that which may not appear to be so based on the data available today. For example, a 2016 study by economists from the Federal Reserve Bank of New York used geo-coded data on bank branches from the FDIC and merged it with tract-level census data on household income and race to identify banking deserts<sup>25</sup>. If online deposits are all recorded at a central office, which, for technological or other reasons, institutions prefer to locate in a particular metropolitan area, then studies like the one conducted by the Federal Reserve Bank of New York staff could fail to identify those areas as being underserved, even though those offices are primarily serving residents of other areas. By the same token, without better available data, firms may determine to direct resources into areas that appear underserved because deposits are not being booked to branches in those locations, when in fact those areas are quite competitive and do not have need for new entrants.

### **SOD Instructions Should Require that Corporate Deposits Be Tagged To Better Reflect Economic Realities**

For the reasons discussed below, we respectfully submit that the SOD Instructions should be revised to require reporting institutions tag corporate deposits<sup>26</sup> so that deposits included within HHI analysis best reflect economic realities.

Currently, the SOD data submission requirements do not distinguish between retail and corporate deposits despite clear differences between the two. Banks that provide deposit services to corporate clients, including large corporations that engage in activities nationwide and generate funds across the nation, typically establish one or more linked deposit accounts for a corporate client and book the deposits to a single location, often in the market near the headquarters of the corporation or a cyber branch near the bank's main office. Because large corporations tend to have their headquarters in metropolitan areas, this means that a significant amount of deposits may be assigned to large metropolitan areas as opposed to other geographic regions where a corporation engages in activities and generates funds. This approach both overcounts the activity in the location of the headquarters and undercounts the activity in other locations and,

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<sup>25</sup> Donald P. Morgan, Maxim L. Pinkovskiy, and Bryan Yang, *Banking Deserts, Branch Closings, and Soft Information*, Liberty Street Economics (Mar. 7, 2016), <https://libertystreeteconomics.newyorkfed.org/2016/03/banking-deserts-branch-closings-and-soft-information/#.Vt5LhtBYG53>.

<sup>26</sup> For this purpose, "corporate deposits" refers to deposits that are not maintained primarily for personal, family or household purposes.



therefore, does not present an accurate reflection of economic realities. Thus, the current SOD data likely causes the HHI analysis to underestimate the level of competition in locations of corporate regional offices. This distortion, in turn, could deter or prevent efficient mergers in such areas.

To better make use of the SOD data, the SOD data submission requirements should require separate tagging of corporate deposits. By separately identifying corporate deposits, the Division and other agencies would be given the option to exclude, to the extent it deems appropriate, corporate deposits in HHI analyses. Thus, tagging would add to the SOD data and increase its utility for competitive and other purposes.<sup>27</sup>

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On behalf of our client(s), we appreciate the opportunity to comment on the Division's review of the Banking Guidelines. If you have any questions, please feel free to contact David L. Portilla ([dportilla@cravath.com](mailto:dportilla@cravath.com); [REDACTED]), Daniel K. Zach ([dzach@cravath.com](mailto:dzach@cravath.com); [REDACTED]) or Will C. Giles ([wgiles@cravath.com](mailto:wgiles@cravath.com); [REDACTED]).

Respectfully submitted,

  
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<sup>27</sup> We note that centrally booked deposits raise similar issues, as discussed above. Significant government deposits held at branches in a local market are handled in much the same way as centrally booked deposits. See 2014 FAQs, Q24.