February 15, 2022

Via Electronic Mail

Jonathan Kanter
Assistant Attorney General for the Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Washington, D.C. 20530.

Re: Department of Justice - Request for Comments on Possible Revision to the 1995 Bank Merger Competitive Review Guidelines

Dear Assistant Attorney General Kanter:

The Consumer Bankers Association (CBA)[1] appreciates the opportunity to comment on the Department of Justice's Antitrust Division's (DOJ) request for comments as to whether and how the DOJ should revise the 1995 Bank Merger Competitive Review Guidelines (Banking Guidelines) to ensure bank merger review is currently sufficient to prevent harmful mergers and whether it accounts for the full range of competitive factors appropriate under the laws. CBA strongly believes the Banking Guidelines currently provide an appropriate level of review for bank mergers and any delay of merger activity will ultimately be harmful for consumers.

The primary objectives of the DOJ's merger policy should be to preserve the benefits of competition for consumers and allow U.S. financial services firms to evolve with the needs of the marketplace. Due largely to bank regulatory reforms in the last 10 years, the U.S. banking system has never been stronger and consumers looking for banking services have access to a wide variety of options from different institutions depending upon their needs. This vast array of options is due in large part to the technological advancements and efficiencies created through stronger partnerships and greater resource allocation, which are the result of a competitive banking sector within an already well-regulated merger environment.

Mergers allow for greater access to financial services

Most bank mergers do not have adverse competitive effects or result in decreased competition within the United States; to the contrary, typically the greater scale and market coverage resulting from merger

[1] The Consumer Bankers Association is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

transactions increase competition and helps the subject banking organizations better meet the evolving needs of their customers.[2] Through mergers, banks can build economies of scale, allowing them to focus on providing better products and services to customers. Mergers can also help banks provide these services to both rural and urban areas without fear that a merger will automatically lead to reduced access to services. In a 2021 study, the Federal Reserve Bank of Cleveland concluded that even if there is a reduction in the number of branches, bank consolidation does not create "banking deserts" when banking access is evaluated based on the distance both urban and rural customers need to travel to find a full-service branch.[3]

Millennials and Generation Z now make up a significant portion of bank customers. An overwhelming majority of these groups have indicated that mobile banking makes it easier to track their money and they use digital banking channels to check their balances, check their accounts for fraudulent charges, and make external transfers. Providing these services has and continues to require significant investments that smaller banks have struggled to make and is a factor cited in past mergers.[4]

Accordingly, mergers can allow relatively smaller companies to compete more effectively with the largest companies in any industry. A goal of many mergers is to realize economic gains by creating economies of scale and gaining increased access to capital, which can translate into lower costs to consumers for better product and service offerings. Such benefits may be difficult or even impossible to achieve in any given industry through the organic growth of existing firms. Merger opportunities for regional banks will create greater competition with larger institutions and inure ultimately to the benefit of consumers in impacted markets.

<u>Competition in financial services has never been greater</u>

The banking sector already faces strict competition from new financial technologies and the increased digitization of the financial services industry. While the total number of banks has fallen, robust competition remains in the market driven by over 4,500 banking institutions and over 5,000 credit unions nationwide. In a 2021 report, the Congressional Research Service concluded that:

> …[W]ith almost 5,000 institutions, most of which are small community banks, there is still a reasonable amount of competition in the market for

[2] Anne K. Bingaman, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Antitrust and Banking* (Nov. 16, 1995) (noting that "[t]he great majority of bank mergers do not cause antitrust concerns, and the Antitrust Division is quite cognizant of that fact. We have on staff some fifty highly-trained economists. As a result, we are familiar with the types of efficiencies that may be produced by bank mergers. To 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.")

[3] Kyle Fee and Erik Tiersten-Nyman, "Has Bank Consolidation Changed People's Access to a Full-Service Bank Branch?" Federal Reserve Bank of Cleveland, (October 7, 2021), https://www.clevelandfed.org/en/newsroom-and-events/publications/community-development-briefs/db-20211006-has-bank-consolidation-changed-peoples-access.aspx

[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* <u>Millennial Banking Insights and Opportunities</u>, FICO (2014)(Retrieved from www.fico.com).

> smaller banks. … A merger between two mid-size banks might make those banks better able to directly compete with the very largest banks.[5]

The decline in the total number of banking institutions from years past is not due primarily to bank mergers, but rather can be attributed to a number of unrelated factors including a shift in the U.S. rural population to urban centers,[6] an unprecedented decline in new bank entries,[7] and, possibly, an unintended consequence of the regulatory environment (i.e., since the passage of Dodd-Frank, which required the creation of 243 new rules, the number of full-service banks nationwide fell by roughly 30 percent from 2010-2018).[8]

Simultaneous to the decline in the number of traditional banks, there has been a rise in competitors offering alternatives to traditional bank products (which are not currently taken into account in the DOJ's competitive analysis), including: online mortgage companies and other online lending services; money-market funds; farm credit systems institutions; and fintechs and other nonbank firms. Banks are forced to compete with these unregulated fintech companies and "shadow banks" that are rapidly growing market share and have the scale and resources to offer digital products to consumers. Recent data indicates that nonbank financial intermediaries control 63 percent of U.S. financial assets,[9] nonbank mortgage companies currently originate 68 percent of mortgage loans,[10] and nonbank commercial lenders provide 59 percent of small business lending.[11] Taking away the freedom of banks to merge and gain the necessary scale to compete with these unregulated companies will result in more banking activities being pushed outside of the regulated space. This will result in more financial services being offered by companies that are not subject to prudential requirements and consolidated supervision to customers who are not protected by the consumer protection laws that apply to the banking industry. Furthermore, recent efforts by both the banking industry and the federal bank regulators to enhance financial inclusion may be undermined and low-and moderate-income communities will be disadvantaged to the extent these companies are not required to comply with the Community Reinvestment Act (CRA).

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[5] Congressional Research Service (CRS), "Bank Mergers and Acquisitions," (October 28, 2021), *CRS In Focus 11956*, https://crsreports.congress.gov/product/pdf/IF/IF11956.

[6] Jerome Powell Confirmation Hearing – Senate Banking Committee - Q&A (January 11, 2022) – Senator Tina Smith (D-Minn.) asked how the Fed thinks about bank mergers today and what he impacts are of bank consolidation. Governor Powell replied that the Fed considers a number of factors, and that bank consolidation has been driven in part by the decline in rural populations, trends in demographic changes, regulatory costs, and other factors.

[7] Explaining the Decline in the Number of Banks since the Great Recession (2015) - https://www.richmondfed.org/~/media/richmondfedorg/publications/research/economic_brief/2015/pdf/eb_15-03.pdf.

[9] Financial Stability Board (FSB), "Interactive Data," *Global Monitoring Report on Non-Bank Financial Intermediation 2021*, December 16, 2021, https://data.fsb.org/dashboard/Time%20Series%20View.

[10] Orla McCaffrey, "Nonbank Lenders Are Dominating the Mortgage Market," *Wall Street Journal*, June 22, 2021, https://www.wsj.com/articles/nonbank-lenders-are-dominating-the-mortgage-market-11624367460.

[11] Manasa Gopal and Phillip Schnabl, "The Rise of Finance Companies and FinTech Lenders in Small Business Lending," *NYU Stearn School of* Business, 2 (August, 2021), https://www.fdic.gov/analysis/cfr/bank-research-conference/annual-20th/papers/gopal-paper.pdf.

The federal bank regulators have become increasingly concerned about this. For example, the Consumer Financial Protection Bureau (CFPB) issued a series of orders this past October to collect extensive information on the business practices of large technology companies as a means to assess and ensure that adequate consumer protections are in place.[12]

Regulators already have the tools they need when reviewing bank mergers

The DOJ, in combination with the federal bank regulators, already have the appropriate tools to prevent mergers that are potentially harmful to competition in the banking industry. Over the last 20 years, across all sectors of the economy, the DOJ has won all but eleven of the approximately 780 mergers it has challenged.[13] Such a track record demonstrates the existing legal framework for merger review by the DOJ is already appropriately supplemented and enhanced by the separate merger review applicable to banks under the statutory purview of the federal bank regulators.

More specifically, the existing process for reviewing proposed bank mergers is a rigorous one. Once a merger application is submitted, the federal bank regulators are required to follow all applicable bank merger laws, including by giving appropriate consideration to issues of safety and soundness, consumer impact, and competition before any approval is granted.

Under the Bank Merger Act (BMA), mergers between depository institutions are required to meet prior approval of the primary federal regulator of the resulting institution.[14] Among other things, the BMA prevents the responsible federal regulators from approving a proposal that would result in a monopoly or would be in furtherance of any attempt to monopolize the business of banking in any relevant market and from approving a proposal that would substantially lessen competition in any market unless the anticompetitive effects are clearly outweighed by concerns for the convenience and needs of the community to be served. The federal bank regulators also must consider the financial and managerial resources and prospects of the companies and depository institutions involved in any proposal and consider the records of the relevant depository institutions under the CRA.

In addition to the BMA, the Bank Holding Company Act (BHCA) establishes nationwide and individual state deposit limits for interstate bank acquisitions.[15] In proposals involving the acquisition of a nonbanking company, the Federal Reserve Board (FRB) must consider whether performance of the activity by a bank holding company affiliate can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests or unsound banking practices. The FRB can deny any proposal that is presented that does not

[12] CFPB, "CFPB Orders Tech Giants to Turn Over Information on their Payment System Plans," (October 21, 2021), https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-tech-giants-to-turn-over-information-on-their-payment-system-plans/.

[13] This aggregate number of challenges was compiled from the Annual Reports to Congress Pursuant to The HartScott-Rodino Antitrust Improvements Act of 1976, by the FTC and the DOJ, available at https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports.

[14] 12 USC 1828(c).

[15]

meet all the statutory factors. The FRB can also deny a merger proposal if the effect of the proposal may be to substantially lessen competition in violation of the standards in the federal antitrust laws.

After the appropriate federal supervisory agency completes its review and approves a proposed transaction under BMA and/or BHCA, it must notify the Attorney General. The DOJ must then decide whether to bring an action under antitrust laws within the time limits prescribed in the BMA.[16] Accordingly, the DOJ's Banking Guidelines use a quantitative analysis to review the competitive effect of bank and bank holding company mergers. Under the long-standing guidance, the DOJ reviews bank merger applications using deposit market shares, market concentration thresholds, and other market facts and conditions. The purpose is to identify proposed mergers that have or do not have significantly adverse effects on competition. Notably, the DOJ's review of bank mergers is independent from review by the bank regulators, and, more specifically, a transaction that exceeds the Herfindahl–Hirschman Index (HHI) threshold concentration standards above which competitive harm is presumed (a measurement of deposit concentration in geographic markets used as a threshold for inferring competitive harm) will elevate concerns in the DOJ's review.

The law makes it clear that the federal bank regulators, in tandem with the review by the DOJ Antitrust Division, should decline to approve any merger application that poses a threat to competition or, in the case of the federal bank regulators, present other issues such as financial stability concerns. For the last two decades, regulators serving under administrations controlled by both major political parties have followed this rigorous process and have concluded that the process of merger examination is already a rigorous and thorough regime, producing institutions that benefit U.S. consumers and the economy.

<u>Pending bank mergers should be permitted to move forward</u>

Any bank merger that meets all the above-referenced requirements for regulatory approval and that is consistent with the statutory factors considered by each of the respective regulatory agencies under their statutory mandates with respect to bank merger should be approved in accordance with applicable law.

Contrary to what has been suggested by some members of Congress, there is no need to pause merger transactions to conduct a review of the current law. Even if one has the view that a review of bank merger policies by banking agencies is needed, imposing a moratorium on pending mergers while such a review occurs is inappropriate and could result in harm to or, at a minimum, delayed benefit to the economy. If the DOJ inappropriately prevents bank mergers that do not pose a threat of competitive harm in accordance with its statutory mandate, it would have a variety of adverse effects for the banking industry. This would include reducing the benefits for consumers that result from increased economies of scale and scope that can improve competition in the provision of banking services by allowing all institutions to compete with other players in the industry. This would also further place banking organizations at a competitive disadvantage relative to non-bank financial services companies as they scale to meet consumer demand for innovative products.

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[16] 12 USC 1828(c)(7)(A).

CBA greatly appreciates the opportunity to share our suggestions and to work with the DOJ as it considers possible revisions to the Banking Guidelines. Should you need further information please do not hesitate to contact the undersigned directly at [redacted] or dpommerehn@consumerbankers.com.

Sincerely,

David Pommerehn
SVP, General Counsel
Consumer Bankers Association