February 15, 2022

TO: Department of Justice
Antitrust Division

Re: Request for Comment on Whether and How the Antitrust Division Should Revise the 1995 Bank Merger Competitive Review Guidelines

Dear Ladies and Gentlemen:

Better Markets[1] appreciates the opportunity to comment on the guidelines captioned above ("merger review guidelines")[2] to the Antitrust Division of the Department of Justice ("DOJ"), in particular regarding the questions it has posed to the public. Better Markets urges the DOJ and the banking regulatory agencies (collectively, "the agencies") to work together to modernize and strengthen the merger review guidelines for the benefit of the American people by implementing the enhancements around assessing the servicing of community needs and financial stability concerns outlined in this letter.

Background

An insufficient merger review process, combined with other factors such as changes in laws and economic events, has contributed to massive consolidation in the banking industry over the last three and a half decades. Since the mid-1980s, the number of commercial banks has declined by around 70 percent. The pace of mergers increased substantially after Congress passed a law in 1994 that codified the right to interstate banking at a national level.[3] Additionally, the 2008 Crash resulted in government-brokered takeovers of large, failing Wall Street banks by already too-big-to-fail banks.[4]

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[1] Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies— including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects and promotes Americans' jobs, savings, retirements, and more.
[2] Available at https://www.justice.gov/sites/default/files/atr/legacy/2007/08/14/6472.pdf
[3] The Riegle-Neal Interstate Banking and Branching Efficiency Act, 12 USC 1811
[4] Bank of America acquired Merrill Lynch and Countrywide Financial; JPMorgan Chase acquired Bear Stearns and Washington Mutual; Wells Fargo acquired Wachovia.

There has also been a consolidation of banking and other financial activities. In 1999 the Gramm–Leach–Bliley Act repealed the portion of the Glass-Steagall Act of 1933 that required the separation of commercial banking, investment banking, and insurance, setting off mega-mergers between these three types of companies, greatly exacerbating the too-big-to-fail problem and creating a too-big and too-complex-to-manage problem.[5] For example, about 30 banks had consolidated into just four gigantic, too-big-to-fail banks by the time of the 2008 Crash.

The consolidation both in the number of banks and in products and services has completely changed the landscape of the U.S. banking industry, reducing competition, and concentrating risks into systemic concerns. Currently, the very largest banks virtually control the U.S. banking system:

- The top four banks hold about half of all assets in the banking system
- The top ten banks hold almost half of all deposits and loans
- JPMorgan Chase, Goldman Sachs, Bank of America, and Citigroup hold about 90% of the total notional amount of all derivatives contracts

The process to assess merger and acquisition applications involves the consideration of four main factors:

1. anticompetitive effects,
2. financial stability risks,
3. effect on the public interest/ convenience and needs of communities served, and
4. the financial condition and management effectiveness at the merging companies.[6]

Yet none of these factors seem to slow the pace of mergers - the bank regulatory agencies have not formally denied a merger application in many years.[7] This includes the two largest bank mergers since the 2008 Global Financial Crisis that have occurred over the last three years. The resulting banks fall into the $250 to $700 billion range, one of the groups of banks that the deregulatory actions of the last four years have affected the most.[8] BB&T and SunTrust banks (renamed Truist Financial) merged in 2019 to become the tenth largest bank holding company at over $500 billion in assets. PNC Bank closed its acquisition of the US operations of BBVA last year to become the eleventh largest bank holding company with around $560 billion in assets.

Mergers of large banks can increase financial stability risks and harm hardworking Americans and small businesses. They can lead to a reduction in consumer banking services or increase the cost associated with them[9] or even to a lack of access altogether when branches are closed, especially in low-income communities. With insufficient access to banking services, there

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[5] See Better Markets Fact Sheet *Glass-Steagall Financial Reform Law and Efforts to Reinstate It* https://bettermarkets.com/sites/default/files/Better%20Markets%20Fact%20Sheet%20on%20Glass-Steagall%20_0.pdf

[6] 12 USC 1828(C)

[7] Jeremy C. Kress, *Modernizing Bank Merger Review*, Yale Journal on Regulation. Vol. 37:435 (2020)

[8] See Better Markets whitepaper, Dennis Kelleher and Tim Clark (June 24, 2020), *No Financial Crash Yet Thanks to Dodd-Frank and Banking Reforms* https://bettermarkets.com/resources/white-paper-no-financial-crash-yet-thanks-dodd-frank-and-banking-reforms.pdf

[9] Vitaly M. Bord. Working Paper. “Bank Consolidation and Financial Inclusion: The Adverse Effects of Bank Mergers on Depositors [Job Market Paper]”.

is the increased use of alternative financial services such as check cashing or payday loans. Additionally, the size of[10] and access to[11] small business loans decline with larger banks, making it more difficult to open or sustain a successful small business. This can have strongly negative long-term impacts on employment and wealth within low-income communities.

The Laws Require the Agencies to Consider Factors Other than Competition and Provide the Agencies with Broad Discretion as to How to Do So

The current merger review process ostensibly prioritizes the factor of anticompetitive effects, seemingly in-line with the implied prioritization with the applicable laws: the Bank Holding Company Act and the Bank Merger Act. These laws are specific that a merger should not be approved if it could lead to a monopoly or if it would substantially lessen competition. However, the laws also grant the agencies substantial discretion as to how to include the non-competition factors (financial stability, community needs, and financial and managerial resources), only directing the agencies to “consider” them in the review process. This discretion allows the agencies to elevate the non-competition factors to their appropriate role in the merger review process, should they choose to do so.

President Biden’s Executive Order[12] from last year highlighted the many detrimental impacts of consolidation throughout the economy, including in banking and the financial industry. That Order encouraged the Attorney General to engage with the banking regulatory agencies to review guidelines around bank mergers for the “revitalization” of the merger oversight process. The agencies should be embracing the opportunity to engage with each other to enhance the merger review processes in a coordinated way, particularly along the dimensions of the public interest and financial stability, taking into account the effects of recent deregulation. Given that the law already requires the agencies to consider other factors and grants them broad authority as to how to do so, this could and should be done.

The Current Thresholds for Anticompetitive Effects Should Remain

The merger review process and assessments published for the public include a quantitative measure for anticompetitive effects but only subjective assessments for the other factors. Under the DOJ’s Bank Merger Guidelines, to assess competition concentration levels are measured by the Herfindahl-Hirschman Index (HHI). A market is considered not to be concentrated if the post-merger HHI is under 1000, moderately concentrated if the post-merger HHI is between 1000 and 1800, and highly concentrated if the post-merger HHI exceeds 1800. Additionally, a bank merger or acquisition generally would not be challenged (in the absence of other factors indicating

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[10] According to national data from the Federal Financial Institutions Examination Council on assessments related to the Community Reinvestment Act, the average small business loan size decreases significantly across bank groupings of increasing size.

[11] Vitaly M. Bord, Victoria Ivashina, Ryan D. Taliaferro (2018) *Large Banks and Small Firm Lending,* National Bureau of Economic Research, working paper 25184; also Achraf Mkhaiber and Richard A. Werner (2021), *The relationship between bank size and the propensity to lend to small firms: New empirical evidence from a large sample*, Journal of International Money and Finance, Vol. 110:102281

[12] President Joseph Biden (July 9, 2021), *Executive Order on Promoting Competition in the American Economy*, Presidential Actions https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/

anticompetitive effects) unless the post-merger HHI is at least 1800 and the merger increases the HHI by more than 200 points.

The metrics and thresholds in the 1995 Banking Guidelines should not be updated to reflect the HHI thresholds in the 2010 Horizontal Merger Guidelines, as asked in the questions posed by the DOJ. The current thresholds recognize the unique risks posed by the banking industry to our economy and the special role of the industry within our economy.

In response to the question posed by the DOJ about the inclusion of non-traditional banks, non-traditional banks should be excluded from the analysis of anticompetitive effects. Their presence in a given community is entirely dependent on those in the community deciding to use their services rather than usage being dependent on physical proximity and a link between the depository base and the banking products and services provided. This nature of non-permanence can skew the point-in-time assessment of competition, as the picture could change rapidly if usage of the non-traditional banks stops.

However, it would be prudent to consider their inclusion on a case-by-case basis (i.e., the exception and not the rule). For example, in an assessment area where there is significant usage of the products and services of non-traditional banks, the merger of two smaller traditional banks could be assessed under the "convenience and needs" criteria to likely improve their ability to provide traditional products and services, thereby increasing competition against the non-traditional products and services.

The Review Process Must Work to Enhance the Public Interest and the Servicing of the Convenience and Needs of Underserved Communities

The assessment process should include provisions that work to improve the availability of products and services in underserved communities. As discussed above, bank mergers can reduce the availability and increase the cost of banking products and services, especially in low-income communities and economically marginalized communities of color.

To this end, this letter fully supports and adopts the following recommendations of the National Community Reinvestment Coalition, as quoted from their October 16, 2020, letter[13] to the DOJ in response to its 2020 request for comments on the 1995 Bank Merger Competitive Review Guidelines.

- *"The Herfindahl-Hirschman Index (HHI) screen of 200/1,800 should not only include heightened anti-trust reviews but also conditional merger approvals requiring concrete public benefits in the specific geographical areas (metro areas or rural counties) where the HHI exceeds this threshold. Currently, the DOJ and the bank agencies give these mergers heightened reviews, occasionally order branch divestitures and rarely institute public benefits remedies.*

[13] Available at https://www.justice.gov/atr/page/file/1330336/download

- *"The informal HHI screen of 100 must be formalized to a presumption that DOJ and banking agencies will require public benefits in impacted areas, particularly in underserved counties.*
- *"When a merger results in an institution of a certain asset size of either $10 billion or $50 billion, a public benefit plan for the banks' entire geographical footprint must be a part of the merger application subject to public comment. NCRC's preferred threshold would be $10 billion since these are large banks and only about 139 banks in the United States are $10 billion or more in assets. However, if the agencies wanted to focus on the very largest banks for this requirement, the threshold of $50 billion could be used.*
- *"NCRC recommends that the agencies consider designating counties as underserved. This would be defined as counties with low levels of retail lending per capita. These counties would receive elevated attention in HHI and public benefits analyses.*
- *"HHI analysis must not only consider deposits but also separately consider home and small business lending. In addition, the agencies should consider consumer lending and payments, but new data reporting requirements would be needed for HHI analysis of these products.*
- *"Public benefit requirements could include CBAs [Community Benefit Agreements] and specific improvements in CRA and fair lending performance measures."*

Regarding the last point, the 2020 NCRC letter notes that "CBAs commit banks to a specified level of loans, investments, and services in the future, which are at a higher level than the previous performance of the merging banks. Robust merger review processes that consider the banks' future abilities to meet community needs in a nondiscriminatory manner best facilitate CBAs, which are a concrete demonstration of public benefit." Such commitments would help to ensure the activities of the merged bank do not reduce in underserved communities, which can occur even if a point-in-time analysis shows that the pre-merged banks are appropriately meeting the needs of the underserved communities.

The Review Process Must Consider More Seriously the Risks to Financial Stability of the Merged Institution

The DOJ and banking regulatory agencies have a duty to assess the financial stability risks resulting from the mergers they review and decide on. Systemic and financial stability risks deserve special scrutiny, especially considering the weakened regulatory framework implemented over the last four years. Strengthening the merger review process in this regard is necessary regardless of the regulatory framework, but the dilution of post-crisis reforms provides even more reason to do so. Despite this, there has been no effort made to strengthen the process even with the two largest mergers since the Global Financial Crisis that were noted above.

Governor Lael Brainard recognized this issue in a statement made after abstaining from voting on the PNC acquisition of the U.S. operations of BBVA:

> "The increases in banking concentration in the $250 to $700 billion asset size category, where common-sense safeguards have been weakened, raise some concerns, and it might be helpful to undertake a broader review of our framework, since we know from experience even noncomplex banks in this size range can pose risk to the financial system when they encounter financial distress."[14]

Clearly, the agencies must do a better job of identifying and assessing systemic risks and financial stability concerns related to merger plans for large banks. A review of the merger approval documentation for the two large mergers noted above shows that the financial stability/systemic risk review was a simple concentration analysis along the five factors used in determining the score assigned to Global Systemically Important Banks (the so-called GSIB surcharge): size, availability of substitute providers, interconnectedness, complexity, and the extent of cross-border activities. A GSIB surcharge score was also computed and compared to firms that are officially designated as GSIBs.

But as Governor Brainard points out, firms that are not GSIBs still can raise financial stability concerns. Therefore, comparing a merged bank to GSIBs is an insufficient exercise. While this can serve as a very high-level indicator of financial stability and systemic risk concerns, more analysis should be performed.

First, for mergers that result in an institution above $250 billion, the agencies should require the submission of a high-level resolution plan for the merged entity. Such a plan would provide great insight into the complexity of the merged entity and its operations and a more involved and appropriate assessment of the implications of its failure. After all, that is exactly the purpose of the recovery plan requirements, and so should be utilized in this process.

Second, the Federal Reserve has a division entirely dedicated to the analysis of financial stability – the Division of Financial Stability. Again, for mergers that result in an institution above $250 billion, the Division of Financial Stability should conduct and provide an assessment of the financial stability concerns the merged entity could raise on its own and in the context of the banking and financial systems as a whole. The inclusion of these two factors would greatly enhance the review of financial stability concerns and potential systemic risks of the merged entity.

Conclusion

After nearly forty years, the agencies need to take account of the ever-increasing consolidation of the banking industry, and they must enhance the merger review process to consider all four factors described above, exercising their discretion under the law to do so. The merger process should be rationalized to ensure that future mergers only enhance the public interest while reducing, or at least not increasing, the level of risk in the system by incorporating the recommendations laid out in this letter.

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[14] Governor Lael Brainard (May 14, 2021), *Statement on PNC/BBVA Application by Governor Lael Brainard*, Board of Governors of the Federal Reserve System https://www.federalreserve.gov/newsevents/pressreleases/brainard-statement-20210514.htm

Sincerely,

Phillip G. Basil
Director of Banking Policy

Better Markets, Inc.
1825 K Street, NW
Suite 1080
Washington, DC 20006
(202) 618-6464
pbasil@bettermarkets.org