Center for American Progress

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Mr. Makan Delrahim
Assistant Attorney General
U.S. Department of Justice, Antitrust Division
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: DOJ Antitrust Division Bank Merger Guidelines Review

Dear Assistant Attorney General Delrahim:

The Center for American Progress ("CAP") is pleased to submit the following comment regarding the Antitrust Division's review of its 1995 Banking Guidelines. CAP is an independent nonpartisan policy institute that is dedicated to improving the lives of all Americans, through bold, progressive ideas, as well as strong leadership and concerted action.

Over the past 40 years, the banking sector has become increasingly concentrated, which has led to an array of harms for consumers, small businesses, the financial system, and the broader economy. It is clear that the Antitrust Division's 1995 Banking Guidelines, and the enforcement thereof, have proven an inadequate curb against excessive bank consolidation and its myriad costs. We believe the Banking Guidelines should be updated to explicitly reflect the known harms that can be caused by bank consolidation. The Antitrust Division should then commit to rigorously enforce the updated guidelines. We are concerned that despite the evidence that has accrued over the past four decades, the Antitrust Division intends to undermine the already-insufficient 1995 Bank Guidelines and conduct even more permissive merger review.

I. Banking consolidation can inflict serious harms on consumers and small businesses

The number of banks in the U.S. has declined from over 14,000 in the early 1980s to less than 4,500 today.[1] During this time period, the largest banks in the country have substantially increased their share of the banking sector's assets, and mergers and acquisitions have played an important role in that growth.[2] According to a 2017 analysis conducted by the Federal Reserve Bank of St. Louis, nearly 80% of U.S. banking markets were classified as "highly concentrated" based on Herfindahl-Hirschman Index metrics and the Antitrust Division's own quantitative

[1] Federal Reserve Economic Data, "Commercial Banks in the U.S.", Federal Reserve Bank of St. Louis, available at https://fred.stlouisfed.org/series/USNUM (last accessed October 2020).
[2] Robert Adams and John Driscoll, "How the Largest Bank Holding Companies Grew: Organic Growth or Acquisitions?," Board of Governors of the Federal Reserve System, FEDS Notes, December 21, 2018, available at https://www.federalreserve.gov/econres/notes/feds-notes/how-the-largest-bank-holding-companies-grew-organic-growth-or-acquisitions-20181221.htm.

thresholds.[3] The end-result of this long-standing trend in consolidation is a more concentrated banking sector that has imposed a series of economic and social costs on consumers and small businesses.

Consolidation in the banking sector has been driven by decades of deregulation and permissive merger enforcement. The erosion and repeal of Glass-Steagall, interstate branching limits, interest rate caps, and other regulations helped fuel a wave of mergers.[4] The loosening of these regulations allowed banks to grow and consolidate across geographies and business lines. Over 10,000 mergers occurred between 1980 and 2010, consisting of more than $7 trillion in acquired assets.[5] Deregulation helped spur this increase in concentration and lax merger oversight failed to curb these trends over time. Between 1972 and 1982, 63 proposed mergers were blocked.[6] Despite a significant uptick in proposed mergers, only 8 were denied between 1983 and 1994.[7] Lax merger review is not simply a relic of the 80s and 90s—it has unfortunately persisted to this day. In 2018, 95% of bank merger applications were approved—the highest approval rate on record.[8] Regulators have not formally denied a bank merger in over 15 years.[9] In just the past year, regulators approved the largest merger since the 2007-2008 financial crisis and a major acquisition by a Wall Street bank.[10]

Bank mergers have led to an increase in the cost of financial services and reduced access to credit for many impacted communities.[11] Banks also tend to close branches and lower the interest rates paid to depositors after mergers—reducing both convenience and savings income for consumers, respectively.[12] The communities most harmed by these effects are those with already-

[3] Andrew P. Meyer, "Market Concentration and Its Impact on Community Banks," Federal Reserve Bank of St. Louis, April 12, 2018, available at https://www.stlouisfed.org/publications/regional-economist/first-quarter-2018/concentration-community-banks.
[4] Jens Hagendorff, Michael Collins, and Kevin Keasey, "Bank deregulation and acquisition activity: the cases of the US, Italy and Germany," Journal of Financial Regulation and Compliance 15(2)(2007):199-209, available at https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.576.4627&rep=rep1&type=pdf; Saqib Aziz, and Jean-Jacques Lilti, "Bank Deregulation, Consolidation and Stability: Evidence on U.S. M&A Centric Activity," Finance 38(1)(2017):85-128, available at https://www.cairn.info/revue-finance-2017-1-page-85.html#.
[5] Robert M. Adams, "Consolidation and Merger Activity in the United States Banking Industry from 2000 Through 2010," Board of Governors of the Federal Reserve System, FEDS Working Paper No. 2012-51, August 8, 2012, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2193886.
[6] Id.
[7] Id.
[8] Jeremy C. Kress, "Modernizing Bank Merger Review," Yale Journal on Regulation 37(2)(2019): 435-498, available at https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1557&context=yjreg.
[9] Id.
[10] Board of Governors of the Federal Reserve System, "Federal Reserve Board announces approval of application by BB&T Corporation to merge with SunTrust Banks," Press Release, November 19, 2019, available at https://www.federalreserve.gov/newsevents/pressreleases/orders20191119a.htm; Board of Governors of the Federal Reserve System, "Federal Reserve Board announces approval of notice by Morgan Stanley," Press Release, September 30, 2020, available at https://www.federalreserve.gov/newsevents/pressreleases/orders20200930b.htm.
[11] Mark J. Garmaise and Tobias J. Moskowitz, "Bank Mergers and Crime: The Real and Social Effects of Credit Market Competition," The Journal of Finance 61(2)(2006): 495-538, available at https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1540-6261.2006.00847.x.
[12] Robin A. Prager and Timothy H. Hannan, "Do Substantial Horizontal Mergers Generate Significant Price Effects? Evidence From The Banking Industry," The Journal of Industrial Economics 46(4)(2003): 433-452, available at https://www.jstor.org/stable/117498?seq=1; Lydia DePillis, "The internet didn't kill bank branches. Bank mergers

limited access to financial services, which are primarily low- and moderate-income communities and communities of color. The increase in price, reduced availability of traditional banking products, and fewer physical banking locations create a vacuum that predatory financial actors can exploit. Payday lenders, check cashers, and other predatory nonbank financial actors tend to increase their footprint and costly product offerings in the wake of bank mergers, which further extracts wealth from these underserved communities.[13] Communities suffering these impacts in the wake of bank mergers have seen lower small business formation, reduced economic development and property values, lower median income, greater income inequality, increased crime, and a range of additional harms.[14] To be sure, not every bank merger has led to a negative outcome. Some bank mergers certainly have the potential to improve efficiencies and lower costs for consumers.[15] But the overall trend in bank consolidation over the past 40 years has imposed net costs on consumers and the economy. Merger review should therefore provide a more robust check against consolidation than the current pro forma process that all-but-guarantees approval.

II. Permissive bank merger policy can exacerbate risks to financial stability

Between 1980 and 2000, the share of banking sector assets held by the 10 largest banks increased from 13.5 percent to 36 percent.[16] Today, the 10 largest banks hold roughly 60 percent of banking sector assets.[17] The increase in size, complexity, and interconnectedness of the largest banks in the country has increased risks to financial stability over time and has created anti-competitive distortions between large and small banks.

The larger a bank grows, the more harm its distress or failure inflicts on the economy. In fact, research from the Federal Reserve shows that the failure of a large bank is significantly more damaging than the failure of several smaller banks that are collectively the same size as the larger bank.[18] The most acute example of the financial stability harms caused by consolidation is the Too-Big-To-Fail ("TBTF") problem and the economic destruction wrought by the 2007-2008

did." *The Washington Post*, July 9, 2013, available at https://www.washingtonpost.com/news/wonk/wp/2013/07/09/the-internet-didnt-kill-bank-branches-bank-mergers-did.

[13] Vitaly Bord, "Bank Consolidation and Financial Inclusion: The Adverse Effects of Bank Mergers on Depositors," Working Paper, November 1, 2018, available at https://scholar.harvard.edu/vbord/publications/bank-consolidation-and-financial-inclusion-adverse-effects-bank-mergers.

[14] Jose Azar, Sahil Raina, and Martin C. Schmalz, "Ultimate Ownership and Bank Competition," May 8, 2019, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2710252.

[15] Adel A. Al-Sharkas, M. Kabir Hassan, Shari Lawrence, "The Impact of Mergers and Acquisitions on the Efficiency of the US Banking Industry: Further Evidence," Journal of Business Finance & Accounting 35(1-2)(2007): 50-70, available at https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1468-5957.2007.02059.x.

[16] Robert M. Adams, "Consolidation and Merger Activity in the United States Banking Industry from 2000 Through 2010."

[17] Research and Statistics Group, "Quarterly Trends for Consolidated U.S. Banking Organizations: Second Quarter 2020," Federal Reserve Bank of New York, available at https://www.newyorkfed.org/medialibrary/media/research/banking_research/quarterlytrends2020q2.pdf?la=en.

[18] Amy G. Lorenc and Jeffery Y. Zhang, "The Differential Impact of Bank Size on Systemic Risk," Board of Governors of the Federal Reserve System, FEDS, September 2018, available at https://www.federalreserve.gov/econres/feds/files/2018066pap.pdf.

financial crisis. Banks were permitted to grow so large, complex, and interconnected, that they became integral to the normal functioning of the financial system. Material distress or failure at these TBTF banks would threaten the stability of the entire system, so these firms and market participants knew that the government would have no choice but to step in and bail them out if they got into trouble. These TBTF banks were thus able to engage in excessive risk-taking without fearing the costs of failure, which would be borne by the government and broader economy.

When these TBTF banks did experience severe stress in 2008, as a result of their highly risky activities and fragile business models, the government stepped into to bail them out.[19] Direct equity injections, extraordinary liquidity facilities, and government-supported mergers were used to keep them from failing.[20] In contrast, over 400 community and regional banks failed during the financial crisis.

While these TBTF firms were saved, the financial crisis, and the bursting of the house price bubble that they were central in inflating, led to a deep and prolonged recession. Millions of families lost their homes, trillions of dollars in wealth was wiped out, and the unemployment rate shot up to 10%.[21]

The continuing existence of a TBTF subsidy suggests that reforms implemented in the wake of the financial crisis have not eliminated the stability threat posed by systemically important banks.[22] The creation of additional TBTF risk ought to be resisted vigorously.

III. Strong bank merger guidelines and enforcement would provide meaningful economic and social benefits

The Antitrust Division's bank merger guidelines, and the enforcement thereof, have failed to curb excessive bank consolidation over the past several decades and the myriad social and economic harms that stem from it. Consumers and small businesses would benefit from stronger guidelines and more rigorous enforcement. Ultimately, the whole economy would benefit from the positive financial stability effects driven by robust bank merger review. It is deeply troubling, therefore, that the Antitrust Division's release for comment suggests that nonbank financial companies should be accounted for in the bank merger guidelines. Broadening the definition of the market for purposes of the competitive analysis would make the guidelines more permissive, exacerbating bank consolidation and its resulting negative effects.

[19] National Commission on the Causes of the Financial and Economic Crisis in the United States, "The Financial Crisis Inquiry Report," February 25, 2011, available at https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf.
[20] Government Accountability Office, "Government Support for Bank Holding Companies," November 2013, available at https://www.gao.gov/assets/660/659004.pdf.
[21] Gregg Gelzinis, Andy Green, and Marc Jarsulic, "Resisting Financial Deregulation" (Washington: Center for American Progress, 2017), available at https://www.americanprogress.org/issues/economy/reports/2017/12/04/443611/resisting-financial-deregulation/.
[22] Financial Stability Board, "Evaluations of the effects of too-big-to-fail reforms," Consultation Report, June 28, 2020, available at https://www.fsb.org/wp-content/uploads/P280620-1.pdf.

Instead of fueling an even more concentrated banking sector, the Antitrust Division should tighten its bank merger guidelines by lowering the HHI threshold that triggers enhanced scrutiny. Clearly the current HHI screening threshold of 1800/200 is an inadequate check on banking concentration. In addition, the bank merger guidelines should take other consolidation-driven negative impacts into account, including financial stability harms, TBTF subsidies, and the availability of physical branches. Moreover, it's critical that the guidelines be coupled with robust enforcement. Traditional harms like higher costs and reduced access to credit have plagued many communities following mergers, yet regulators have stood by and refused to more rigorously enforce the law to prevent these persistent problems.

Finally, these efforts should be conducted jointly with the prudential banking agencies. To improve merger review, all agencies with jurisdiction must work together to tackle this issue uniformly.

Thank you for your consideration.

Sincerely,

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