

December 13, 2021

The Honorable Merrick Garland  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Ave. NW  
Washington, D.C.

The Honorable Jerome Powell  
Chair  
Board of Governors of the Federal Reserve System  
20th Street and Constitution Avenue NW  
Washington, D.C.

The Honorable Michael Hsu  
Acting Comptroller of the Currency  
Office of the Comptroller of the Currency  
400 7th St. SW  
Washington, D.C.

The Honorable Jelena McWilliams  
Chair  
The Federal Deposit Insurance Corporation  
550 17th Street, NW  
Washington, D.C.

Dear Attorney General Garland, Chair Powell, Acting Comptroller Hsu, and Chair McWilliams:

The undersigned organizations (and individuals ) write to you with concern over a wave of bank mergers and acquisitions that have been approved by the federal bank regulators in the last several years. Bank consolidation has produced historically high concentration in the U.S. financial sector. The number of U.S. banks has plummeted from 18,000 in the 1980s to less than 5,000 today. More than three-quarters of local banking markets are considered uncompetitive, with a Herfindahl-Hirschman Index exceeding the DOJ's threshold for "high concentration." Nonetheless, federal bank regulators have not formally rejected a merger application in over 15 years.<sup>1</sup>

The laissez-faire stance adopted by the Department of Justice and the federal bank regulators and the inadequacies in the current Bank Merger Competitive Review Guidelines (the "[Bank Merger Guidelines](#)") have hurt small businesses, community banks, and households, especially those in BIPOC communities. We urge you to temporarily halt consideration of pending bank mergers until the DOJ and banking agencies adopt a plan that strengthens the guidelines to protect consumers

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<sup>1</sup>See Jeremy C. Kress, *Modernizing Bank Merger Review*, 37 Yale Journal on Regulation (2020).

and promote financial stability. This aligns with President Joe Biden’s Executive Order on Promoting Competition in the American Economy that encouraged the DOJ and the banking agencies to “update guidelines on banking mergers” in order to combat excessive concentration in the financial sector that has limited consumer choice and increased banks’ market power.<sup>2</sup>

Approval rates for bank mergers have reached record highs, while the agencies wave through mergers more quickly than ever.<sup>3</sup> This fall, the fifth-biggest bank in the country, U.S. Bancorp, announced an agreement to acquire MUFG Union Bank for \$8 billion. This comes after a series of troubling mergers that created “super-regional” banks, such as the acquisition by PNC of U.S. bank units of BBVA,<sup>4</sup> and the 2019 approval of the merger of SunTrust & BB&T<sup>5</sup>

These and other mergers have resulted in growing concentration in the banking sector, which, in turn, has harmed consumers and small businesses, undermined financial stability, and negatively impacted consumer privacy. We outline below some of the costs to small businesses and local communities from bank mergers and provide recommendations on how to strengthen the Bank Merger Guidelines.

### **Bank Consolidation’s Harmful Effects on Consumers**

Bank mergers have reduced availability of credit for consumers, increased fees for basic banking services, and lowered the interest rates offered to depositors.<sup>6</sup> These adverse effects are even more pronounced in communities of color and low- and moderate-income communities where bank consolidation has led to significant branch closures.<sup>7</sup> The vast majority of bank customers still rely on in-person branches for access to banking services; thus closures allow high-fee check cashing and predatory financial firms to step in.<sup>8</sup> Additionally, bank mergers have been tied to broader community harms, including increases in evictions, increasing rates of debts sent to collection agencies, and even rising property crimes.<sup>9</sup>

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<sup>2</sup> President Joseph R. Biden. Executive Order on Promoting Competition in the American Economy. 2021. <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>

<sup>3</sup> *Id.* at 544

<sup>4</sup> <https://www.federalreserve.gov/newsevents/pressreleases/orders20210514a.htm>; <https://www.federalreserve.gov/newsevents/pressreleases/brainard-statement-20210514.htm> (dissent by Governor Brainard).

<sup>5</sup> <https://www.federalreserve.gov/newsevents/pressreleases/orders20191119a.htm>.

<sup>6</sup> Vitaly M. Bord, Bank Consolidation and Financial Inclusion: The Adverse Effects of Bank Mergers on Depositors 6-9 (Dec. 1, 2018); Mark J. Garmaise & Tobias J. Moskowitz, Bank Mergers and Crime: The Real and Social Effects of Credit Market Competition, 61 J. FIN. 495, 509-14 (2006).

<sup>7</sup> Gary A. Dymski, The Bank Merger Wave: The Social And Economic Consequences Of Financial Consolidation, pgs 249-50. (1999)

<sup>8</sup> See Bord, *Supra* note 6, Pgs 23-25.

<sup>9</sup> *Id.* at pgs 30-32; See Garmaise & Moskowitz, *Supra* Note 6, pgs 518-523.

The Bank Merger Act and Bank Holding Company Act require the banking agencies to consider the convenience and needs of the community. To fulfill this statutory obligation, regulators need to evaluate holistically how bank consolidation has harmed consumers and LMI neighborhoods.

### **Bank Mergers Harmful Effects on Small Businesses**

Bank consolidation has also harmed small businesses. Community banks have traditionally specialized in lending to local entrepreneurs and farmers. When banks consolidate, however, small business lending declines, as bigger banks tend to serve larger commercial customers. Thus, bank mergers have hurt small businesses by reducing the supply of credit,<sup>10</sup> increasing the cost of credit, and shrinking the average loan size.<sup>11</sup> Small business lending is particularly affected when a community bank is acquired by a nonlocal bank.<sup>12</sup> Scholars have linked bank consolidation to lower rates of small business formation and adverse effects for their local economies, including decreases in commercial real estate development, new construction, and local property values.<sup>13</sup> Communities affected by bank mergers also suffer rising unemployment, declines in median income, and rising income inequality.<sup>14</sup> These damaging impacts historically have disproportionately disadvantaged people of color, women, people with limited English proficiency as individuals as well as the communities where these people live.

### **Bank Mergers Exacerbate Systemic Risk**

Bank consolidation has also increased risks to financial stability. As the Federal Reserve's own research demonstrates, distress at one large bank poses a significantly greater systemic risk than distress at a number of smaller banks with equivalent total assets.<sup>15</sup> Due to recent mergers, PNC, Truist, and Capital One are now bigger than Washington Mutual, Countrywide, and National City when they failed in the 2008 financial crisis.<sup>16</sup> Large bank mergers can exacerbate existing problems, such as the "too-big-to-fail" dynamic, as well as related problems, such as when banks become "too-big-to-manage."<sup>17</sup> Too-big-to-fail status can also distort competition in banking markets by

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<sup>10</sup> Allen N. Berger et al., *The Effects of Bank Mergers and Acquisitions on Small Business Lending*, 50 J. FIN. ECON. 187, 217, 222 (1998); Steven G. Craig & Pauline Hardee, *The Impact of Bank Consolidation on Small Business Credit Availability*, 31 *Journal of Banking & Finance* 1237, 1248-58 (2007); Paola Sapienza, *The Effects of Banking Mergers on Loan Contracts*, 68 *Journal of Finance* 329, 364 (2002).

<sup>11</sup> See Garmaise & Moskowitz, *Supra* note 6, pg 515; Paola Sapienza, *The Effects of Banking Mergers on Loan Contracts*, 68 *Journal of Finance* 329, 364 (2002).

<sup>12</sup> Japa Jagtiani & Raman Quinn Maingi, *How Important Are Local Community Banks to Small Business Lending? Evidence from Mergers and Acquisitions* 18-20..

<sup>13</sup> See Garmaise & Moskowitz, *Supra* note 6, pg 515

<sup>14</sup> *Id* at pg 518

<sup>15</sup> Amy G. Lorenc & Jeffery Y. Zhang, *The Differential Impact of Bank Size on Systemic Risk* 12-18 (Fed. Reserve Bd. Fin. & Econ. Discussion Series, Working Paper No. 2018-066, 2018).

<sup>16</sup> Arthur E. Wilmarth, Jr., *Raising SIFI Threshold to \$250B Ignores Lessons of Past Crises*, *American Banker* (Feb. 7, 2018).

<sup>17</sup> Jeremy C. Kress, *Solving Banking's "Too Big to Manage Problem,"* 104 *Minnesota Law Review* 171, 186-192 (2019); Lev Menand, *Too Big to Supervise: The Rise of Financial Conglomerates and the Decline of Discretionary Oversight in Banking*, 103 *Cornell Law Review* 1527, 1583 (2018).

allowing large conglomerates to enjoy more favorable financing than their smaller rivals.<sup>18</sup> To date, neither the Department of Justice nor the Bank Merger Guidelines have considered these effects.

### **Recommendations to Strengthen the Bank Merger Guidelines**

The well-documented dangers of excessive bank mergers outlined above highlights why the Bank Merger Guidelines need to be strengthened. Among our recommendations to strengthen the guidelines are :

1. Lower the Herfindahl-Hirschman Index (“HHI”) threshold for enhanced scrutiny of proposed mergers and determine whether common ownership of banks by large asset managers causes competitive harms in ways not captured by current HHI analysis;
2. Demand evidence that the merger will produce measurable benefits to impacted consumers, such as expanding credit, lowering fees, expanding product offerings, or increasing access to low-cost bank products and services, especially in BIPOC communities
3. Insist that merging banks have at least a CRA rating of “outstanding” when serving low- and moderate-income communities.
4. Strengthen the financial criteria for bank mergers by redefining what's considered “well capitalized.”<sup>19</sup> The Federal Reserve has lowered this threshold to a point barely above minimum capital requirements for bank holding companies<sup>20</sup> and thus rendered the “well-capitalization” standard functionally meaningless.<sup>21</sup>

In sum, a hands-off approach to bank merger reviews has resulted in increased bank consolidation that has inflicted substantial harm on the economy, on small businesses, and communities, particularly low- and moderate income communities and BIPOC communities. We urge you to pause approvals until the Bank Merger Guidelines are strengthened. This would answer President Biden’s call to reinvigorate competition in the American economy.

Sincerely,

Copy to:

The Honorable Janet Yellen, Secretary of the Treasury  
The Honorable Ron Klain, Chief of Staff to the President

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<sup>18</sup> Bhanu Balasubramnian & Ken B. Cyree, Has Market Discipline Improved After the Dodd-Frank Act?, 41 Journal of Banking & Finance 155, 165 (2014); Viral V. Acharya et al., The End of Market Discipline? Investor Expectations of Implicit Government Guarantees 30–33 (Munich Personal RePEc Archive, Working Paper No. 79700, 2016).

<sup>19</sup> 12 U.S.C. § 1842(d)(1)(1).

<sup>20</sup> Kress, *Modernizing Bank Merger Review*, *supra* note \_\_, at 492-495.

<sup>21</sup> Kress, *Modernizing Bank Merger Review*, *supra* note \_\_, at 493-495.

Signers:

20/20 Vision DC

Action Center on Race & the Economy (ACRE)

AFL-CIO

American Economic Liberties Project

Better Markets

Committee for Better Banks

Consumer Action

Consumer Federation of America

Delaware Community Reinvestment Action Council, Inc.

Demand Progress

Earth Ethics, Inc.

Florida Consumer Action Network Foundation

Institute for Agriculture and Trade Policy

Institute for Local Self Reliance

Liberation in a Generation

Main Street Alliance

MHANY Management Inc.

Mountain State Justice

National Consumer Law Center (on behalf of its low-income clients)

National Fair Housing Alliance

New Jersey Citizen Action

Open Markets Institute

Public Citizen

Revolving Door Project

SC Appleseed Legal Justice Center

Texas Appleseed

U.S. PIRG

VOICE (Voters Organized In Civic Engagement)OKC

Womxn from the Mountain

Woodstock Institute