U.S. Chamber of Commerce

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February 15, 2022

The Honorable Jonathan Seth Kanter
Assistant Attorney General
Department of Justice, Antitrust Division
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: Public Comment on Bank Merger Competitive Analysis

Dear Assistant Attorney General Kanter:

The U.S. Chamber of Commerce ("the Chamber") appreciates the opportunity to submit these comments to the U.S. Department of Justice's Antitrust Division in response to the solicitation for public comments as to whether and how to revise the 1995 Bank Merger Competitive Review Guidelines.

The Chamber agrees that DOJ should revise the Guidelines to reflect the significant changes in the last quarter century to current economic realities and to our empirical understanding of the market, including the following: the explosive growth in competition from online banks, credit unions, and other finance options for consumers; studies indicating that concentration does not reduce competition, particularly given the relative ease of entry into credit markets and the ready availability of competition from creditors outside of particular geographic markets; studies finding that mergers can increase competition; and studies that call into question the use of deposits as a metric for calculating the Herfindahl-Hirschman Index (HHI).

We also point out that rather than revise the merger guidelines to subject more proposed transactions to deeper scrutiny, DOJ could best increase competition in credit markets by using its competition advocacy tools to support deregulatory policies that would allow more companies to compete.

Current Financial Markets are Very Competitive

In the last quarter century, competition has increased substantially in credit markets. According to the Bureau of Consumer Financial Protection's Taskforce on Federal Consumer Financial Law Report ("CFPB Taskforce Report"), the consumer credit

market “has seen new entrants, innovative products, aggregate growth, reinvention of incumbents, and decline or departure of companies that could not keep pace with the others. These are the hallmarks of competitive markets.”[1] Likewise, a recent study of the banking sector from 1984 to 2016 found that bank output was “supercompetitive” and that fees have declined during this time.[2]

Consumer choices have increased substantially. Bank branches and ATMs have risen by tens of thousands, brought banking to underserved communities, and moved banks closer to consumers in larger markets. Similarly, in the past two decades, membership in credit unions has risen by about 50 million, to 120 million members, in 2019. Credit unions compete very vigorously with banks on interest rates for loans and credit cards.[3] Online banks, and the expanded geographic reach of brick-and-mortar banks with an online presence, also have significantly expanded competition in credit markets, particularly in light of the disruptions caused by COVID-19. Finally, consumers have still other choices to find credit, including certain retailers, auto lenders, and other non-depository lenders.

Bank Concentration Does Not Suggest a Lack of Competition in Credit Markets

In part because of this explosion in competition, numerous studies have found that bank concentration does not impair competition.[4] For instance, as the CFPB’s Taskforce Report points out, Houston, Texas has an HHI near 2,300, but also has 92 commercial banks, while Columbus, Ohio has an HHI level around 2,100, but has 48 banks and nine thrifts. In any event, concentration, “although rising, remains below 2,000 for banks and thrifts in most markets.”

Moreover, current HHI calculations do not accurately measure the amount of competition in a marketplace. As the CFPB Taskforce Report explains, HHIs are based on total deposits, which are “at best loosely correlated with the various financial services that banks and thrifts provide. Because banks can readily reallocate funds from one purpose to another—for example, from business finance to consumer credit or from mortgages to auto loans—their ability to compete for consumers is not tied tightly to their total assets.” Placing less emphasis on HHIs may result in the imposition of fewer branch divestiture requirements in connection with bank mergers and thus less inconvenience, confusion, and disruption for customers.

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[1] See https://files.consumerfinance.gov/f/documents/cfpb_taskforce-federal-consumer-financial-law_report-volume-1_2022-01_amended.pdf.

[2] Slade Mendenhall, Commercial Bank Competition, Riegle-Neal, and Dodd-Frank, SSRN (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2967998.

[3] See CFPB Taskforce Report.

[4] See CFPB Taskforce Report at 366-67.

In any event, setting aside HHI scores, the ease of entry into credit markets helps to protect and promote competition. As the CFPB Task Force Report explains, "In sectors where competitors can increase capacity quickly, as is the case in consumer credit, concentration exaggerates the significance of large firms and underestimates the importance of small firms. Dominant lenders cannot raise rates and count on small competitors to empty their inventory of loans." The CFPB Taskforce found that ease of entry "remains essentially free of intrinsic impediments in credit markets. The number of suppliers available to serve consumers' demand for credit, across a variety of credit products and services, far exceeds levels considered adequate for robust competition. There appears to be no intrinsic barrier to competition in lending."

Indeed, as the CFPB's Taskforce itself found, in many instances mergers can increase competition and financial stability.[5] After a merger, the combined institution can have a stronger and broader capital base and liquidity position, more financial resources to improve customer products, and more resources to invest, particularly in lower-income communities. Larger institutions have more resources to protect consumer data and to defend against cyberattacks. For example, many banks merged after Congress lifted laws that prevented banks from operating across state lines (a salutary trend that explains, in part, the rise in bank concentration). These banks are now able to compete more broadly and effectively in more of the country – an improvement for consumers. Likewise, regional bank mergers allow smaller banks to compete with the largest global-systematically important banks, such that these types of mergers can increase the number of viable competitors in a market and reduce financial stability risks. Such mergers can allow banks to compete more effectively with the many other institutions that offer credit. thereby helping to preserve multiple options for credit seekers.

Finally, mergers also allow banks to make the technology investments to provide their customers with the digital and other services that they want and expect[6]. Across the spectrum of financial services, companies are introducing new products, including online markets for mortgages, certificates of deposit, and commercial loans. Digitization has increased the benefits of scale, but also requires major investments in fixed capital and ongoing investments in digital security.

Many scholars and practitioners agree that bank mergers can benefit consumers. During the administration of President Clinton, the Antitrust Division itself recognized

[5] See CFPB Taskforce Report at 366-67.

[6] 80% of millennials use digital banking to check their account balances, 76% use digital banking to check their account for fraudulent charges, and 65% use digital channels to make external transfers. *Millennial Banking Insight and Opportunities* (2014) https://www.slideshare.net/FICO/millennial-banking-insights-opportunites

that bank mergers can improve efficiency which, in turn, can lead to lower costs and better products for consumers:

> The 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.[7]

Likewise, numerous studies have concluded that bank mergers have pro-competitive effects.[8]

To Further Increase Competition, DOJ Should Advocate for Deregulatory Policies

Rather than revise the merger guidelines to subject more proposed transactions to deeper scrutiny, DOJ could best increase competition in financial markets by using its competition advocacy tools to support deregulatory policies that would allow more companies to compete. Research indicates that bank consolidation increased after legislative and regulatory changes increased the cost of operations.[9] For instance, the Dodd-Frank Act raised compliance costs across the board, but smaller banks bore the burden disproportionately.[10]

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[7] Anne K. Bingaman, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Antitrust and Banking* (Nov. 16, 1995).

[8] *E.g.*, Hughes, Joseph P., Mester, Loretta J., and Choon-Geol Moon. 2001. "Are scale economies in banking elusive or illusive? Evidence obtained by incorporating capital structure and risk-taking into models of bank production," *Journal of Banking and Finance* 25, 2169-2208; Hughes, Joseph P., and Loretta J. Mester. 2013. "Who said large banks don't experience scale economies? Evidence from a risk-return-driven cost function," *Journal of Financial Intermediation* 22, 559-585; Wheelock, David C., and Paul W. Wilson. 2012. "Do large banks have lower costs? New estimates of returns to scale for U.S. banks," *Journal of Money, Credit and Banking* 44, 171-199; Feng, Guohua and Apostolos Serletis. 2010. "Efficiency, technical change, and returns to scale in large US banks: Panel data evidence from an output distance function satisfying theoretical regularity," *Journal of Banking & Finance* 34, 127-138; Papadimitri, Panagiota, Staikouras, Panagiotis, Travlos, Nickolaos G., and Chris Tsoumas. 2009. "Punished banks' acquisitions: Evidence from the U.S. banking industry," *Journal of Corporate Finance* 58, 744-764.

[9] Marshall Lux, The State and Fate of Community Banking February 9, 2015, M-RCBG ASSOCIATE WORKING PAPER SERIES, No. 37 (2015), at https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/Final_State_and_Fate_Lux_Greene.pdf.

[10] See CFPB Taskforce Report at 370-71 (discussing studies).

Moreover, as the CFPB Taskforce points out, government policies, rather than industry consolidation, typically create the largest barriers to competition: "The most effective and durable barriers are those that become ossified in the amber of laws and regulations. In the case of credit, those barriers can take the form of enforceable interest-rate caps, licensing restrictions, territorial and product limitations, suppression of information, and outright prohibitions of competition." By working to lower these barriers, DOJ could enhance competition and better protect consumers.

Antitrust laws should have near universal application, not be tailored to specific sectors or companies. The Chamber is opposed to merger control efforts that deviate from an evidence-based assessment of potential anticompetitive harm. We also oppose applying different competition standards to certain sectors or companies. As the Chamber has already publicly stated, we believe that moving away from a near universal application of the antitrust laws risks diluting the expectation that all economic actors must compete and that the rules of competition apply to all equally.[11]

Conclusion

For these reasons, the Chamber agrees that DOJ should revise the Guidelines to reflect the significant changes in the last quarter century to current economic realities and to our empirical understanding of the market, particularly the growth of competition in credit markets and the benefits of mergers to consumers. Importantly, the Chamber encourages the DOJ to provide notice and public comment of any updates to the 1995 Bank Merger Competitive Review Guidelines. The Chamber appreciates the opportunity to share its views.

Sincerely,

Tom Quaadman
Executive Vice President
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce

Sean Heather
Senior Vice President
International Regulatory Affairs & Antirust
U.S. Chamber of Commerce

[11] U.S. Chamber of Commerce, "Unlocking Antitrust: 3 Reasons Why Simplicity is Antitrust's Greatest Strength," found at https://www.uschamber.com/series/above-the-fold/unlocking-antitrust-3-reasons-why-simplicityantitrust-s-greatest-strength.