

February 15, 2022



## OPEN MARKETS

Jonathan Kanter  
Assistant Attorney General  
Antitrust Division  
United States Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Dear Assistant Attorney General Kanter,

The Open Markets Institute (“Open Markets”)<sup>1</sup> writes this letter in response to the Department of Justice’s request to seek public comment regarding the agency’s Bank Merger Competitive Analysis.<sup>2</sup>

### **Overview of the Banking Sector**

Over the past several decades, there has been a “rising tide of economic concentration” in the American banking sector, resulting in the highest amount of market concentration the industry has ever seen.<sup>3</sup> The top four companies in the investment banking sector account for 68.1% of total industry revenue in 2021, and the top five industrial banks account for 76.4% of industry revenue in 2021, according to the most recent IBIS World Reports.<sup>4</sup>

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<sup>1</sup> The Open Markets Institute is a nonprofit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine fair competition and threaten liberty, democracy, and prosperity. Open Markets uses research and journalism to expose the dangers of monopolization, identifies changes in policy and law to address them, and educates policymakers, academics, movement groups, and other influential stakeholders to establish open, competitive markets that support a strong, just, and inclusive democracy.

<sup>2</sup> *Antitrust Division Banking Guidelines Review: Public Comments Topics & Issues*, U.S. DEP’T JUST. (Dec. 17, 2021), <https://www.justice.gov/atr/antitrust-division-banking-guidelines-review-public-comments-topics-issues-guide>.

<sup>3</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294, 315 (1962).

<sup>4</sup> Derek Longhini, *Investment Banking & Securities Dealing in the US*, IBIS WORLD 5, 23 (Oct. 2021) (The investment banking sector “is composed of companies and individuals that provide a range of securities services, including investment banking and broker-dealer trading services.”); Jullian Guirguis, *Industrial Banks in the US*, IBIS WORLD 5, 22 (Oct. 2021) (“Industrial banks, also known as industrial loan companies, are financial institutions authorized to make consumer and commercial loans and to accept federally insured deposits.”).

Where there were once almost 24,000 banks in the United States in the late 1960s,<sup>5</sup> today there are less than 5,000.<sup>6</sup> This drastic increase in concentration is derived from the near nonexistent merger enforcement from federal agencies.

Mergers are the principal strategy for banks to expand their corporate footprint. We see this in particular with the four largest banking holding companies. JPMorgan Chase, Bank of America, Citigroup, and Wells Fargo collectively hold over 45 percent of all customer bank deposits – totaling over \$4.6 trillion.<sup>7</sup> A period of mergers and acquisitions from 2005 to 2009 led to their outsized growth:

- **JPMorgan Chase:** Chase Manhattan; JPMorgan; Bank One; First Chicago NBD; Manufacturers Hanover; Washington Mutual; Bear Stearns; and Texas Commerce.
- **Bank of America:** NationsBank; FleetBoston; C&S/Sovran; and Boatmen.
- **Citigroup:** Salomon Smith Barney; European American Bank; Fidelity Federal S&L; First Federal S&L; and New Biscayne S&L.
- **Wells Fargo:** Wells Fargo; Norwest; Wachovia; First Union; and South Carolina National Bank.

Other significant bank mergers in recent years include:

- Morgan Stanley acquired E\*TRADE's brokerage and bank (2020): Prior to its acquisition, E\*TRADE was listed as the 44<sup>th</sup>-largest depository holding company, with \$71.4 billion in assets. After the merger, Morgan Stanley's assets exceeded \$1 trillion. The Federal Reserve approved the merger, despite noting that post-merger, Morgan Stanley would control nearly 13% of deposits in Virginia without operating any retail branches.
- PNC and BBVA USA Bancshares (2021): House Financial Services Committee Chairwoman Maxine Waters criticized the proposed merger in 2020, noting it would create the fifth-largest bank in the United States.<sup>8</sup>
- BB&T and SunTrust Bank (2019): This merger was opposed by the National Black Farmers Association, who found the merger would make markets more concentrated in several regions in Virginia, North Carolina, Georgia, and Florida.<sup>9</sup>

The primary regulators with bank merger review authority include the Department of Justice, the Federal Deposit Insurance Corporation, which specifically oversees mergers concerning state nonmember banks, the Office of the Comptroller of the Currency (OCC), which specifically oversees mergers concerning national banks, and the Federal Reserve, which specifically

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<sup>5</sup> *Number of Banks in the U.S., 1966-2017 (Graph)*, INST. FOR LOCAL SELF-RELIANCE (May 14, 2019), <https://ilsr.org/number-banks-u-s-1966-2014/>.

<sup>6</sup> *Number of FDIC-insured commercial banks in the United States from 2000 to 2020*, STATISTA (Nov. 2021), <https://www.statista.com/statistics/184536/number-of-fdic-insured-us-commercial-bank-institutions/>.

<sup>7</sup> *The Banking Oligopoly in One Chart*, VISUAL CAPITALIST (Jan. 25, 2016), <https://www.visualcapitalist.com/the-banking-oligopoly-in-one-chart/>.

<sup>8</sup> *Waters Statement on Proposed Acquisition of BBVA USA by PNC*, U.S. HOUSE COMM. FIN. SERVS. (Nov. 18, 2020), <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=407021>.

<sup>9</sup> Letter from National Black Farmers Association to Jerome H. Powell, Chair of the Bd. of Governors of the Fed. Reserve Sys., Makan Delrahim, Assistant Attorney Gen. for the U.S. Dep't of Just., and Joseph J. Simons, Chairman of the Fed. Trade Comm'n (Mar. 20, 2019), <https://www.bfalaw.com/sitefiles/news/2019-03-20-nbfa-letter-re-suntrust-and-bbt-merger.pdf>.

oversees mergers concerning state member banks.<sup>10</sup> Despite such a wide regulatory net managing bank mergers, federal regulators have approved virtually every bank merger application they have received. The Federal Reserve has not denied a single merger application in more than 15 years.<sup>11</sup> The Department of Justice has not challenged a single bank merger since 1985.<sup>12</sup> Third-party data show that between 1980 and 2021, there have been more than 16,000 bank mergers.<sup>13</sup> By approving so many mergers, it is clear that the prudential regulators have primarily come to favor vague and unclear notions of corporate efficiency and profitability rather than the overall public interest.<sup>14</sup>

The agencies have ignored their congressional mandate to prevent undue concentrations of power in the financial sector. Federal bank merger review has been reduced to nothing more than a “rubber stamp,” as Chairwoman Waters wrote in a December 2021 letter calling on the banking regulators to impose a moratorium on approving any bank mergers that result in a banking entity with more than \$100 billion in total assets.<sup>15</sup>

President Joe Biden's Executive Order on Promoting Competition in the American Economy encourages federal agencies — including the Department of Justice and other financial regulators — to “update guidelines on banking mergers” to address systemic concentration in the industry.<sup>16</sup> For years, Open Markets has been a proponent of agencies enacting clear, bright-line merger rules.<sup>17</sup> We continue to advocate for this sensible and effective policy here. We believe bright-line rules will be faithful to congressional intent to discourage bank consolidation and establish a transparent and consistent regulatory environment for parties to determine when a merger is lawful and when it will be challenged.

## **Mergers Are Harmful to the Public, Workers, and Small Businesses**

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<sup>10</sup> Jeremy C. Kress, *Modernizing Bank Merger Review*, 37 YALE J. ON REG. 435, 439, 445 (2020).

<sup>11</sup> *Id.* See also Memorandum from the FSC Majority Staff to Comm. on Fin. Servs. (Nov. 27, 2019) (stating “based on data provided by the Federal Reserve, from January 1, 2006 through December 31, 2017, over 3,800 merger applications were submitted to the agency. During this eleven-year period, however, the Federal Reserve did not reject any merger application.”), archived at <https://web.archive.org/web/20191213142412/https://financialservices.house.gov/uploadedfiles/hhrg-116-ba00-20191204-sd002.pdf>.

<sup>12</sup> Kress, *supra* note 10, at 453.

<sup>13</sup> *Bank Merger Trends*, BANK STRATEGIST, <https://www.bankingstrategist.com/bank-merger-trends> (last visited Jan. 29, 2022).

<sup>14</sup> Kress, *supra* note 10, at 476 (stating “rather than conducting a searching inquiry, the agencies typically assume that a transaction will benefit the public.”).

<sup>15</sup> Letter from Maxine Waters, Chairwoman of the U.S. House of Representatives Comm. on Fin. Servs., to Jerome H. Powell, Chair of the Bd. of Governors of the Fed. Reserve Sys., Jelena McWilliams, Chairman Fed. Deposit Insurance Corp., and Michael Hsu, Acting Comptroller of the Currency (Dec. 10, 2021), [https://financialservices.house.gov/uploadedfiles/waters\\_bank\\_ma\\_review\\_letter\\_121021.pdf](https://financialservices.house.gov/uploadedfiles/waters_bank_ma_review_letter_121021.pdf).

<sup>16</sup> Exec. Order No. 14036, 86 Fed. Reg. 36987, <https://www.federalregister.gov/documents/2021/07/14/2021-15069/promoting-competition-in-the-american-economy>.

<sup>17</sup> See, e.g., Open Markets, *Restoring Antimonopoly Through Bright-Line Rules*, PROMARKET (Apr. 26, 2019), <https://promarket.org/2019/04/26/restoring-antimonopoly-through-bright-line-rules/>; Robert H. Lande & Sandeep Vaheesan, *Preventing the Curse of Bigness Through Conglomerate Merger Legislation*, 52 ARIZ. STATE L.J. 75 (2020); Daniel A. Hanley, *How Antitrust Lost Its Bite*, SLATE (Apr. 6, 2021), <https://slate.com/technology/2021/04/antitrust-hearings-congress-legislation-bright-line-rules.html>.

Merger law in the United States is under-enforced by the Department of Justice, Federal Trade Commission, and federal administrative agencies empowered with merger review from Congress.<sup>18</sup> A large body of research has also found that corporate consolidation contributes to increased consumer prices and markups.<sup>19</sup> Mergers also lead to fewer small business loans,<sup>20</sup> and do not yield the promised efficiencies claimed by merging corporate entities.

### ***Mergers Lead to Price Increases***

In the most comprehensive retrospective study of horizontal mergers, economist John Kwoka found that even when the success of mergers is evaluated by the narrow “consumer welfare” framework of lower prices and increased output, most mergers fail to provide their asserted benefits.<sup>21</sup> Kwoka's study found that most transactions led to a price increase, with a mean price increase of 4.31% across all mergers.<sup>22</sup> In one case, prices increased over 50% after a merger.<sup>23</sup> Kwoka's other research has also found that when a merger reduced the number of firms from seven to six, 80% of those mergers resulted in a price increase.<sup>24</sup>

### ***Mergers Don't Improve Productivity***

Another study examining the price markup and productivity effects of mergers in the manufacturing sector found that mergers, particularly horizontal mergers, create higher price-cost markups and generally do not improve plant- or firm-level productivity.<sup>25</sup> This lack of merger-related productivity improvements is in line with another comprehensive study in 1987 that found that mergers, in general, failed to yield economic efficiencies and indeed, more often than not, resulted in a loss of efficiency.<sup>26</sup>

### ***Mergers Harm Workers***

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<sup>18</sup> Samuel R. Reid, *Antitrust and the Merger-Wave Phenomenon: A Failure of Public Policy*, 3 ANTITRUST L. & ECON. REV. 25 (1969); *Modern U.S. Antitrust Theory and Evidence Amid Rising Concerns of Market Power and its Effects*, THURMOND ARNOLD PROJECT, <https://som.yale.edu/centers/thurman-arnold-project-at-yale/antitrust-enforcement-data> (last visited Jan. 29, 2022).

<sup>19</sup> See Vitaly M. Bord, *Bank Consolidation and Financial Inclusion: The Adverse Effects of Bank Mergers on Depositors*, HARVARD UNIV. (Dec. 1, 2018), <https://scholar.harvard.edu/vbord/publications/bank-consolidation-and-financial-inclusion-adverse-effects-bank-mergers>.

<sup>20</sup> Yichen Xu, *The Importance of Brick-and-Mortar Bank Offices for Lending: Evidence from Small Business and Home Mortgage Lending, 1999-2015*, UNIV. OF DEL. (2018), <https://udspace.udel.edu/handle/19716/23925>.

<sup>21</sup> JOHN KWOKA, *MERGERS, MERGERS CONTROLS, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY* (2015); see also Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, 64 ANTITRUST BULL. 479 (2019).

<sup>22</sup> KWOKA, *supra* note 21, at 94.

<sup>23</sup> *Id.*

<sup>24</sup> John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns?*, 81 ANTITRUST L.J. 837, 863 (2017).

<sup>25</sup> Bruce A. Blonigen & Justin R. Pierce, *Evidence for the Effects of Mergers on Market Power and Efficiency* 3-5 (Nat'l Bureau of Econ. Research, Working Paper No. 22750, Oct. 2016).

<sup>26</sup> F.M. SCHERER & DAVID J. RAVENSRAFT, *MERGERS, SELL-OFFS, AND ECONOMIC EFFICIENCY* 202-03 (1987).

Other research has found that mergers create other harms, including lower wages for workers,<sup>27</sup> lost jobs, decreased worker mobility to find alternative employment,<sup>28</sup> and concentrated markets. And the anti-worker effects exacerbate the already great disparities of wealth and power in American society and leave markets to be structured by private ordering rather than by the public through its political institutions.<sup>29</sup>

### ***Mergers Lead to Bank Branch Closures and Other Adverse Impacts on Local Communities***

In the banking sector specifically, mergers produce several public harms. Mergers frequently result in branch office closures. For example, after SunTrust merged with BB&T of North Carolina in 2019, the new corporation closed 565 branches between 2017-2020 — equal to 16.5% of their total combined network.<sup>30</sup> Branch closures have skyrocketed since 2009, with more than 13,400 closures taking place throughout America.<sup>31</sup>

Branch closures are particularly harmful because they deprive communities of essential banking services and make obtaining those services significantly harder. Disadvantaged communities without local banking services are vulnerable to the entry and expansion of predatory financial services companies such as check-cashing and payday lending.<sup>32</sup>

Banks that close their branch offices also deprive communities of banking services that are critical for economic development. Communities without banks lead to increased prices for credit for certain classes of borrowers as well as lost jobs.<sup>33</sup> A study from the University of Delaware concluded that “the closure of each physical branch [of a bank] causes a 20% decrease in the total number and the volume of small business lending, even in the areas with sufficient alternative local branches.”<sup>34</sup> One journalist from *American Banker* detailed the effects of rural Duncan, Arizona, losing its last branch office. When the last branch office of the National Bank of Arizona closed in Duncan, “Local business owners no longer [had] a place to deposit cash each night, nor anywhere nearby to apply for a loan.”<sup>35</sup>

Even without office closures, bank mergers still suppress economic development. Researchers at the Federal Reserve Bank of Philadelphia found that, on average, mergers between a local

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<sup>27</sup> Efraim Benmelech et al., *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 24307, 2018); José Azar, Ioana Marinescu & Marshall Steinbaum, *Labor Market Concentration 2* (Nat'l Bureau of Econ. Research, Working Paper No. 24147, 2017), <http://www.nber.org/papers/w24147>.

<sup>28</sup> José Azar et al., *Concentration in U.S. Labor Markets: Evidence from Online Vacancy Data 16-17* (IZA Discussion Paper, No. 11379, 2018), <https://www.econstor.eu/bitstream/10419/177183/1/dp11379.pdf>.

<sup>29</sup> Arthur E. Wilmarth Jr., *Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 U. CIN. L. REV. 1283, 1328, 1446 (2013).

<sup>30</sup> Palash Ghosh, *US Banks Closing Branches At Rapid Pace, Making Poor And Rural Customers Vulnerable To Usurious Lenders*, FORBES (Jan. 29, 2021), <https://www.forbes.com/sites/palashghosh/2021/01/29/us-banks-closing-branches-at-rapid-pace-making-poor-and-rural-customers-vulnerable-to-usurious-lenders/?sh=3a5c88a57691>.

<sup>31</sup> *Id.*

<sup>32</sup> Kress, *supra* note 10, at 459-60.

<sup>33</sup> *Id.*

<sup>34</sup> Xu, *supra* note 20, at 1.

<sup>35</sup> Kevin Wack, *When a Small Town Loses its Only Bank*, AM. BANKER (Feb. 2, 2020), archived at <https://web.archive.org/web/20200304221213/https://www.americanbanker.com/news/when-a-small-town-loses-its-only-bank>.



community bank and a nonlocal acquirer created significant small business lending credit gaps.<sup>36</sup> Specifically, the researchers found that in certain communities, after banks merged, they were 11 percentage points more likely to decrease their lending to small businesses.<sup>37</sup>

Other evidence shows bank mergers result in “decrease[d]...commercial real estate development, new construction activity, ...local property prices... [while at the same time leading to increased] unemployment...and income inequality.”<sup>38</sup> Research from the Federal Reserve also shows that beyond these more localized harms, increased consolidation in the banking sector leads to increased economy-wide risks and significant financial disruption.<sup>39</sup>

The data show that a vibrant ecosystem of banks is an essential ingredient to economic development for communities — but unchecked mergers have created an environment where such a circumstance is not possible. Without access to financial services offered by banks, communities are left to languish, while dominant banking corporations can continue to rake in record profits driven by their relentless mergers and unduly exacerbate systemic risk to the national economy.<sup>40</sup>

It is important to remember that banks are publicly chartered financial agencies – requiring approval from either the federal or state government to exist. Banks are also endowed with the extraordinary power to create and distribute money in the form of collecting bank deposits and creating loans. With this kind of power, granted exclusively from public institutions, should come public responsibility to the communities where the bank resides. From the evidence, it is clear that mergers detract banks from serving the public.

While the public and the agencies themselves must continue to pressure Congress to act by strengthening merger enforcement, agencies can and must do their part to use their congressionally delegated powers to enact a robust merger enforcement environment.

## **The Purpose of Our Merger Laws Is to Take a Vigorous Prophylactic Approach**

### ***The Clayton Act and the 1950 Celler-Kefauver Amendments***

The Clayton Act, as amended by the 1950 Celler-Kefauver Act, is the primary anti-merger law in the United States.<sup>41</sup> It is an incipiency statute intended to stop exclusionary and predatory mergers *before* the public is harmed and concentrated power becomes entrenched. The statute states that violations occur when the effect of a merger “may be substantially to lessen

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<sup>36</sup> Julapa Jagtiani & Raman Quinn Maingi, *How Important Are Local Community Banks to Small Business Lending? Evidence from Mergers and Acquisitions* (Fed. Reserve Bank of Phila., Working Paper No. 18-18, June 2018), [https://www.communitybanking.org/~media/files/communitybanking/2018%20papers/session1\\_paper2\\_jagtiani.pdf](https://www.communitybanking.org/~media/files/communitybanking/2018%20papers/session1_paper2_jagtiani.pdf).

<sup>37</sup> *Id.* at 3.

<sup>38</sup> Kress, *supra* note 10, at 460.

<sup>39</sup> *Id.* at 439.

<sup>40</sup> *Bank Profits Soar, Helped by Merger Frenzy, Fewer Bad Loans*, ASSOCIATED PRESS (Oct. 14, 2021), <https://apnews.com/article/business-earnings-3aea3ff02f96e64a42d10ca3aef54aaa>; *Profits at America's Banks are Sky-High*, ECONOMIST (Apr. 17, 2021), <https://www.economist.com/finance-and-economics/2021/04/17/profits-at-americas-banks-are-sky-high>.

<sup>41</sup> Clayton Antitrust Act of 1914, Pub. L. No. 63–212, 38 Stat. 730 (1914). Celler–Kefauver Act, Pub. L. No. 81-899, 64 Stat. 1125 (1950).

competition, or to tend to create a monopoly,<sup>42</sup> Congress structured violations of the statute to require only probabilistic, not certain, harms to the public resulting from mergers.<sup>43</sup> As a leading antitrust scholar noted about the 1950 Celler-Kefauver amendments, “[W]e can be certain that Congress wanted to err on the side of losing productive efficiency rather than risk the formation of market power.”<sup>44</sup> In other words, Congress structured the Clayton Act to incentivize firms to grow by engaging in socially beneficial behavior such as increased investments in research and development, pay and benefits to workers, and infrastructure, rather than by merger.<sup>45</sup>

In a series of controlling decisions in the 1960s, the Supreme Court established a detailed set of protocols governing the enforcement of the Clayton Act that were designed to faithfully effectuate Congress' command concerning merger enforcement. For example, in *United States v. Philadelphia National Bank*, the court established a structural presumption that establishes a prima facie case if any plaintiff (government or otherwise) shows that a merger results in a firm “controlling an undue percentage share of the market.”<sup>46</sup> The Supreme Court also stated that a 30% market share qualifies as “an undue percentage share” and noted that even 20% might be sufficient.<sup>47</sup> This holding, known as the structural presumption, has been applied in multiple courts of appeal.<sup>48</sup>

Additionally, despite the acceptance by federal administrative agencies,<sup>49</sup> the Supreme Court also established a clear rule on the usage of efficiencies as a defense to an otherwise illegal merger. The Supreme Court held in three cases that they are not allowed and should not be considered.<sup>50</sup> In its most cogent statement on this issue, the Supreme Court in *FTC v. Procter & Gamble Co.*, “Possible economies cannot be used as a defense to illegality.”

### ***The Statutes Governing Bank Mergers Establish a Vigorous Enforcement Regime***

The Bank Holding Company Act of 1956, the Bank Merger Act of 1960, and the Bank Merger Act Amendments of 1966 are the three statutes governing bank mergers.<sup>51</sup> While they are separate acts, they are deeply intertwined. Before these statutes were enacted, bank mergers

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<sup>42</sup> 15 U.S.C. § 18.

<sup>43</sup> *Brown Shoe*, 370 U.S. at 323. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

<sup>44</sup> Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 134 (1982).

<sup>45</sup> See generally 95 Cong. Rec 11493 (Aug. 15, 1949) (statement of Rep. Yates).

<sup>46</sup> *Philadelphia Nat'l Bank*, 374 U.S. at 363.

<sup>47</sup> *Id.* at 364 n.41.

<sup>48</sup> *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001); see also *Polypore Intern., Inc. v. FTC*, 686 F.3d 1208, 1216 (11th Cir. 2012).

<sup>49</sup> U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES §§ 6-7 (2010).

<sup>50</sup> 386 U.S. 568, 580 (1967); *Brown Shoe*, 370 U.S. at 344 (“Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.”). *Philadelphia Nat'l Bank*, 374 U.S. at 371 (“We are clear...that a merger the effect of which ‘may be substantially to lessen competition’ is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial.”).

<sup>51</sup> Bank Holding Company Act of 1956, Pub. L. No. 84-511, 70 Stat. 133 (1956) (codified as amended at 12 U.S.C. §§ 1841-52); Bank Merger Act, Pub. L. No. 86-463, 74 Stat. 129 (1960) (codified as amended at 12 U.S.C. § 1828(c)); Bank Merger Act Amendments of 1966, Pub. L. No. 89-356, 80 Stat. 7 (1966) (codified as amended in 12 U.S.C. § 1828(c)).

faced few regulatory checks.<sup>52</sup> After their enactment, it is clear Congress wanted to establish a robust merger review environment.

Among the three acts, the Bank Merger Act of 1966 is the primary statute governing bank mergers. When enacted, it was meant to “adopt[] the Supreme Court’s approach and brought banking directly under the Sherman and Clayton Acts[.]”<sup>53</sup> Additionally, the legislative history states that the act was intended to “mak[e] the bank supervisory agencies give substantially more emphasis to the antitrust standards in determining the competitive effects of a merger than they did under the 1960 [Bank Merger Act], so that the trend toward ever-larger numbers of bank mergers and ever-increasing concentration in the banking industry will not continue.”<sup>54</sup>

The 1966 act clearly states that bank mergers that result in “a monopoly. . . in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States. . . . whose effect in any section of the country may be substantially to lessen competition, or . . . in any other manner would be in restraint of trade” cannot be approved.<sup>55</sup> Moreover, the act established a strong anti-merger public interest test that states that a bank merger cannot be approved if the adverse effects of the transaction are “clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.”<sup>56</sup> For each merger, regulatory agencies must consider the anti-competitive effects of a bank merger and conduct its own investigation whether a proposed merger does not meet the “convenience and needs of the community to be served.”<sup>57</sup> But also, the merging parties must show how the proposed merger satisfies the convenience and needs of the community to be served.<sup>58</sup>

The convenience and needs factor is, therefore, a clear indicator from Congress that “competition among commercial banks is not the sole criterion for judging a merger.”<sup>59</sup> Instead, Congress requires federal agencies to consider broader social and economic goals, as well as the effects on local communities where the parties operate, and forces the merging parties and regulators to clearly detail the benefits of the merger on the community.

Additional amendments to the Bank Merger Act of 1966 also require reviewing agencies to consider the potential adverse effects of a bank merger on underserved communities and systemic risk to the economy.<sup>60</sup>

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<sup>52</sup> Since most bank mergers were asset acquisitions, the original Clayton Act, enacted in 1914, did not apply. Until the mid-1940s where the Supreme Court ruled that money transactions like those in insurance were interstate commerce, regulators also widely believed the antitrust laws did not apply to banks. Kress, *supra* note 10, at 443-45.

<sup>53</sup> Samuel Richardson Reid, *Legislation, Regulation, Antitrust, and Bank Mergers*, 92 *BANKING L.J.* 6, 14-15 (1975).

<sup>54</sup> 112 *CONG. REC.* 2441 (1966).

<sup>55</sup> 12 *U.S.C.* § 1842(c).

<sup>56</sup> 12 *U.S.C.* § 1828(c)(5)(A)-(B).

<sup>57</sup> Kress, *supra* note 10, at 476-77.

<sup>58</sup> 12 *U.S.C.* § 2901(a)(1); *see also* *United States v. First City Nat’l Bank*, 386 *U.S.* 361, 364 (1967).

<sup>59</sup> *Application of the Bank Mergers Act of 1966 to “Small Bank” Mergers*, 84 *HARV. L. REV.* 185, 191 (1970).

<sup>60</sup> Community Reinvestment Act of 1977, Pub. L. No. 95-128, § 804, 91 Stat. 1111, 1148 (1977) (codified at 12 *U.S.C.* § 2903); Dodd-Frank Wall Street Reform and Consumer Protection (Dodd-Frank) Act, Pub. L. No. 111-203, § 604(f), 124 Stat. 1376, 1602 (2010) (codified at 12 *U.S.C.* § 1828(c)(5)).



Similar to the prophylactic nature of the Clayton Act as revised by the 1950 amendments, the 1966 Bank Merger Act has a prophylactic standard such that the harmful effects of a merger do not have to fully exist before a violation occurs. As one court stated, the government merely needs to provide “objective indications of reasonably probable anticompetitive effect[s]” to prove a violation of the act.<sup>61</sup>

Despite the near nonexistence of merger enforcement from federal agencies, the statutory framework, consistent amendments and refinements to existing law, multiple variables that reviewing agencies must consider, and multiple agencies empowered with broad review authority make it clear that Congress desired to create a robust, comprehensive, detailed, and vigorous enforcement environment for bank mergers.

### **The Agencies Should Adopt Bright-Line Merger Rules**

As Open Markets has repeatedly asserted,<sup>62</sup> we believe the only effective way to ensure Congress' commands are effectuated is by establishing a bright-line rules framework.

Bright-line rules provide a number of benefits to merger enforcement. First, bright-line rules allow for consistent and fair enforcement from the agencies. Second, clear rules give clear notice to firms looking to merge their operations and thus do not leave parties questioning whether their action will result in costly and often unpredictable litigation.

Given the broad language stated by Congress, the agencies responsible for bank merger review — the Federal Reserve, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency — have the authority to issue guidance documents to give notice to the public how the respective agencies will interpret and enforce their merger review authority. We strongly believe the Department of Justice's 1968 Merger Guidelines provide a good model that banking regulators should emulate.<sup>63</sup>

The 1968 Guidelines detailed that a horizontal merger would violate the Clayton Act and thus be challenged by the department if the top four firms in an industry had a combined market share of greater than 75% and two firms attempted to combine each with 4% or more of that market. The analysis for vertical mergers was similar. The Department of Justice stated a vertical merger would be challenged if a supplier with 10% or more share in one market and an actual or potential customer in another market had 6% or more market share in a downstream market.

Open Markets believes that incorporating bright-line market share values will help inform and guide bank merger review and significantly assist regulators with determining precisely when a bank merger serves the convenience and needs of a community. A complete analysis of whether a bank merger transaction serves the convenience and needs of a community will likely be needed no matter what transaction the agency reviews. However, based on the harms generated from increased concentration in the banking industry, the convenience and needs of a community cannot possibly be served when a merger unduly reduces banking options. Establishing bright-line rules related to market share will, particularly for mergers where at least one of the parties has a significant presence, clearly establish whether a transaction will be

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<sup>61</sup> United States v. First Nat'l Bank, 310 F. Supp. 157, 161 (D. Md. 1970).

<sup>62</sup> See *supra* text accompanying note 17.

<sup>63</sup> 1968 Merger Guidelines, U.S. DEP'T JUST. (1968), <https://www.justice.gov/archives/atr/1968-merger-guidelines>.

challenged and simplify the analysis for the respective regulator. Such a circumstance will also significantly speed up and invigorate enforcement and, importantly, deter bank mergers that create markets that are highly concentrated in the first place.

Open Markets recognizes that bright-line rules do not alleviate all the circumstances surrounding the transparency and predictability of mergers. Nevertheless, bright-line rules incorporating the market shares of the merging parties would significantly improve the current legal environment and ensure that markets do not become too concentrated.

Open Markets also recognizes that guidelines are only persuasive as opposed to binding authority on the courts. But the courts have historically given significant weight and deference to merger guidelines.<sup>64</sup> We see no reason why reviewing courts would abandon this historical practice in regards to bank merger review and guidelines governing their administration.

### **Conclusion**

Regulatory approvals of bank mergers have for far too long functioned as a mere rubber stamp. To ensure that future mergers are truly in the public interest and do not exacerbate the already pronounced concentration in the banking sector, we urge all federal agencies to use their discretion in enforcing the bank merger laws to adopt merger guidelines that establish clear bright-line rules.

Sincerely,

Open Markets Institute

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<sup>64</sup> Hillary Greene, *Guidelines Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 811 (2008).