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September 18, 2023

Submitted electronically via Regulations.gov

Mr. Johnathan Kanter
Assistant Attorney General for the Antitrust Division
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Ms. Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: ICBA COMMENT IN RESPONSE TO PROPOSED DOJ AND FTC MERGER GUIDELINES [FTC-2023-0043-0001]

Dear Mr. Kanter and Ms. Khan,

The Independent Community Bankers of America (ICBA)[1] appreciates this opportunity to submit comments in response to the updated draft merger guidelines published by your agencies.[2] Unlike many other advanced economies, America's banking system is not monopolized by a small handful of large financial institutions – the American consumer has the choice to bank at several large money center banks, midsized regional banks, or one of several thousand locally owned and operated community banks. The competition that exists between banks of different sizes and business models is a strength of our financial system and we are supportive of merger guidelines that help preserve our unique and competitive market for banking services.

Specifically, we believe that, absent serious threats to financial stability, mergers and acquisitions by the nation's largest banks are unlikely to be pro-consumer because they trend towards the further concentration of the industry in the hands of a few. These banks – which already benefit from the taxpayer-funded subsidy of being "Too Big to Fail" – may take deposits in one community and lend them to a large corporation in a different community thousands of miles away. In general, we believe that

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[1] The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services. With nearly 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than $5.8 trillion in assets, over $4.8 trillion in deposits, and more than $3.5 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org.

[2] Available at: https://www.regulations.gov/document/FTC-2023-0043-0001.

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consumers are better served by local institutions that take consumer deposits and reinvest them locally in the homes, farms, and small businesses of their neighbors.

We further remind the agencies that the Riegle-Neal Interstate Banking and Branching Efficiency Act established concentration limits on banking including a ten percent nationwide deposit cap as well as statewide caps of thirty percent of total deposits.[3] ICBA strongly supports these nationwide and statewide caps as a way to ensure that the "Too Big to Fail" banks do not entirely dominate the banking industry. We also strongly support the national concentration limits on total consolidated liabilities that are established by Section 622 of the Dodd Frank Wall Street Reform and Consumer Protection Act.

I. The Bank Merger Act

Bank mergers in the United States are treated differently than mergers in other sectors. Indeed, until the Supreme Court's decision in *United States v. Philadelphia National Bank*, bank mergers were considered outside the reach of review under Section 7 of the Clayton Act. As Justice Harlan observed in his dissenting opinion in that case, "[t]he key to this case is found in the special position occupied by commercial banking in the economy of this country. With respect to both the nature of the operations performed and the degree of governmental supervision involved, it is fundamentally different from ordinary manufacturing and mercantile businesses."[4]

In 1966, following the *Philadelphia National Bank* case, Congress significantly overhauled the Bank Merger Act of 1960 in order to clarify and limit the applicability of antitrust laws to bank mergers.[5] Pursuant to the amendments of 1966, no insured depository institution may merge with another depository institution without prior approval of the appropriate federal banking agency or agencies (either the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and/or the Federal Reserve Board of Governors, depending on the institutions' charter type and Federal Reserve System membership status). The relevant agency shall not approve a merger transaction "which would result in a monopoly, or which would be 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" or which would "substantially lessen competition" unless the anticompetitive effects would be "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."[6]

The role of the Department of Justice (the Department) in evaluating bank mergers is to provide a Report on Competitive Factors to the appropriate federal banking agency.[7] This report is not required if the responsible federal banking agency finds that it must act immediately in order to prevent the probable failure of one of the insured institutions involved in the transaction. Once the appropriate federal banking agency or agencies approve a bank merger transaction, the Department has a period of time, determined by the circumstances of the transaction, to bring a legal action challenging any

[3] 12 U.S.C. 1842(d)(2)(A).
[4] *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 374 (1963) (Harlan, J. dissenting).
[5] PL 89-356.
[6] 12 U.S.C. 1828(c)(5).
[7] 12 U.S.C. 1828(c)(4).

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transaction that it believes violate the federal antitrust laws – specifically the Sherman Act and the Clayton Act. Unless the Department alleges that a bank merger violates Section 2 of the Sherman Act, courts are instructed to consider "the financial and managerial resources and future prospects of the existing and proposed institutions, the convenience and needs of the community to be served, and the risk to the stability of the United States banking or financial system."[8]

The existence of the review process outlined in the Bank Merger Act is a manifestation of Congress's intent for the Department to play a secondary, advisory role in the evaluation of bank mergers. Banks play a unique role in the American economy and there may be cases where the public interest is served by a bank merger that promotes financial stability or the needs and convenience of the community, even if the merger has some anticompetitive effect. In our view, and the view of Congress, the federal banking regulators are usually better situated to evaluate these trade-offs than the Department.

II. The Department's Bank Merger Guidelines

Because Congress has created a separate process for reviewing bank mergers, **we strongly recommend that the Department maintain its existing practice of reviewing bank mergers according to a separate set of Bank Merger Guidelines – rather than applying the non-industry specific Horizontal Merger Guidelines or the Proposed Guidelines.** Banking is fundamentally different from ordinary manufacturing and mercantile businesses because it lies at the very heart of the nation's financial and monetary system. Therefore, while an analysis of the competitive effects of bank mergers is necessary and appropriate – particularly where large regional or national banks are concerned – the review of bank mergers must also consider their broader implications on the financial and managerial resources of the depository institutions involved, their effects on the overall safety and soundness of the banking system, how systemically important the merging banks are to the banking system, and on the needs and convenience of bank customers. These factors are not adequately captured using a set broad set of industry-agnostic guidelines.

The Department sought two rounds of public comment on the existing Bank Merger Guidelines in 2020 and 2021. ICBA's letters in response to those previous requests for comment are available https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/doj-bank-merger-guidlines-comment--10-1-2020.pdf?sfvrsn=a0d03b17_0 and https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-regulators/comments-on-doj-bank-merger-analysis and are incorporated into this letter by reference.

To briefly restate the key issues raised in our previously letters we believe that the Department should:

- Create a *de minimis* exception where merger transactions between two banks, each of which has less than $1 billion in assets, would lead to the production by the Department of a report on the competitive factors of the transaction to the responsible banking agency but would not trigger an independent competitive effects analysis of the deal by the Department. Mergers between banks of this size do not tend to lead to the monopolization of the banking industry

[8] *See* 12 U.S.C. 1828(c)(7)(B).

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and are presumptively not anticompetitive. We believe it is a misallocation of Department resources to subject them to undue scrutiny.

- Focus its resources on review of the largest bank mergers. Specifically, we argue that in mergers where the acquired or acquiring bank has more than $100 billion in assets, the Department should consult with the appropriate federal banking regulators to determine whether the benefits of the merger outweigh the risk the combined institution will pose systemic risk or be "Too Big to Fail." The Department and federal banking regulators should not approve mergers that lead to the creation of additional taxpayer subsidized "Too Big to Fail" banks.

- Include all relevant competitors to banks within the market definition when conducting its competitive effects review. Community banks do not only compete with other community banks. Credit unions, online banks, fintechs, the farm credit system, independent mortgage banks, and other non-bank lenders are significant competitors with community banks for both loans and deposits. A market definition that concludes that other banks are the only relevant competitors is flawed and will make any market look more concentrated than it is in fact.

- Increase scrutiny of credit union acquisitions of community banks. Purchases of community banks by credit unions harm taxpayers because they convert taxpaying community banks into federally tax-exempt non-profits. These acquisitions also harm low- and moderate- income (LMI) consumers because the combined institution becomes exempt from the Community Reinvestment Act (CRA), which leads to reduced transparency and a decreased incentives to lend in LMI census tracts.

III. The Proposed Guidelines

While our position is that the Department should issue separate guidelines for the review of bank mergers, we will offer some additional commentary on the proposed guidelines. In our view, these guidelines represent a significant change in the way that the Department and the FTC review horizontal mergers.

A. Herfindahl-Hirschman Index Screen

When the agencies measure the level of concentration in a market, they use the Herfindahl-Hirschman Index (HHI) – which is calculated by summing the squares of the market shares of companies in a market. In the 2010 Horizontal Merger Guidelines, the agencies defined "highly concentrated markets" as markets with an HHI of over 2500 and said that "[m]ergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power."[9]

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[9] Department of Justice and Federal Trade Commission, "Horizontal Merger Guidelines," Section 1.51 General Standards (April, 1992), available at: https://www.justice.gov/atr/horizontal-merger-guidelines-0.

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By contrast, the Bank Merger Guidelines do not use the 2500/ ↑200 HHI screen from the Horizontal Merger Guidelines to flag mergers as being likely to enhance market power. Instead, the Bank Merger Guidelines have flagged mergers with a post-merger HHI over 1800 and an increase of more than 200 for further review.

Here, the proposed guidelines say "Markets with post-merger HHI greater than 1,800 are highly concentrated. A merger causes undue concentration and triggers a structural presumption that the merger may substantially lessen competition or tend to create a monopoly when it would result in a highly concentrated market and produce an increase in the HHI of more than 100 points."[10] Lowering the thresholds of this quantitative screens will flag more mergers – including mergers in less concentrated markets for competitive review.

In our view, the 1800/ ↑200 screen in the existing Bank Merger Guidelines is an appropriate, and more moderate, alternative between the existing Horizontal Merger Guidelines and the 1800/↑100 screen proposed. An 1800/ ↑200 would still capture mergers in relatively less concentrated markets for review, but only if they significantly increased concentration in those markets – and therefore created a someone greater potential for the post-merger firm to enhance market power.

B. The *Philadelphia National Bank* Presumption

The Proposed Guidelines enshrine a legal presumption known as the *Philadelphia National Bank* Presumption (PNB Presumption). The PNB Presumption, which arose from the case *United States v. Philadelphia National Bank*, stands for the presumption that mergers where the merged firm has more than 30% market share are presumptively unlawful. In *Philadelphia National Bank,* the Court held that "The merger of appellees will result in a single bank's controlling at least 30% of the commercial banking business in the four-county Philadelphia metropolitan area. Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat."[11]

Mirroring the PNB Presumption, the Proposed Guidelines would conclude that a merger that "creates a firm with a share over thirty percent presents an impermissible threat of undue concentration regardless of the overall level of market concentration"[12] when it is accompanied by an HHI increase of 100 points or more.

In our view, the PNB Presumption is a misguided and overly simplistic approach to analyzing mergers generally and bank mergers in particular. Something like the PNB Presumption might be useful if it were confined to analysis of entire industries – a merger between two nationwide industrial companies that allows them to control more than 30% of the production of a given commodity may well create competitive concerns appears deserving of scrutiny by the FTC or the Department. However, the usefulness of simplistic market share analysis rapidly diminishes when it is used in a local market to scrutinize a merger between small or midsized firms that could in no reasonable sense be considered a

[10] *Supra* note 2 at 6.
[11] *United States v. Philadelphia Nat. Bank,* 374 U.S. 321, 364 (1963).
[12] *Supra* note 2, at 7.

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monopolist on a nationwide or even regional scale. Use of market share presumptions like the PNB Presumption in small markets often results in undue scrutiny on mergers that have no serious anticompetitive effects and may actually prevent the formation of new companies with the scale and efficiency to challenge nationwide or regional incumbents.

Consider the following hypothetical market:

Name	Out of Market		In Market		
	Branches	Deposits	Branches	Deposits	Share
Regional Bank 1	500	150,000,000,000	6	1,200,000,000	34.3
Community Bank 1	8	750,000,000	5	700,000,000	20.0
Community Bank 2	5	500,000,000	5	475,000,000	13.7
Mega Bank 1	4,000	2,200,000,000,000	3	450,000,000	12.9
Community Bank 3	2	250,000,000	4	375,000,000	10.7
Regional Bank 2	1,150	200,000,000,000	3	300,000,000	8.6

A merger between Community Bank 1 and Community Bank 3 in this market would result in a post-merger bank with an in-market deposit share of 30.7%, triggering the PNB Presumption that this firm would present an “impermissible threat of undue concentration.” In our view, this approach to merger analysis strains credibility.

The post-merger firm resulting from a merger of Community Banks 1 and 3 would have total deposits (in market and out of market) of $2.75 billion. That would make it about 1.8% of the size of Regional Bank 1, its largest in market competitor and about 0.125% the size – or 1/800th – the size of the in market mega bank that it competes against. Given this massive disparity in size, it is unlikely that a merger between Community Banks 1 and 3 would result in a firm that would be able to inappropriately exercise market power or monopolize the market, but strict application of the PNB Presumption would require the Department to begin with the assumption that this merger violates the antitrust laws.

The reality is that a merger like the one described in the hypothetical above may be the most pro-competitive option in the market. For example, if one of the merging banks is at risk of insolvency, a merger may allow for the combined institution to preserve bank branches and prevent losses to the Deposit Insurance Fund. Additionally, the merger may result in a combined institution that has the scale necessary to better meet its regulatory compliance burdens or to provide technological services like online banking apps and real time payments that are increasingly demanded by consumers. To begin the merger analysis with the presumption that a merger between two small banks who have relatively large market shares in a given market but that are competing against much larger regional or national banks is anticompetitive may ultimately result in driving more consumers to banks that already have the scale to meet regulatory and technological demands.

C. Market Definition

Because banks compete head-to-head with non-banks for both loans and deposits, non-banks must be included in the market definition when evaluating bank mergers. The Department’s existing and

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proposed guidelines define the market in bank mergers much too narrowly. The proposed guidelines state that "Market participants often encounter a range of possible substitutes for the products of the merging firms. However, a relevant market "cannot meaningfully encompass that infinite range" of substitutes."[13] While we agree that a market cannot and should not include an infinite range of substitutes, it must include substitutes that are functionally identical to the average consumer.

An example of the direct competition between banks and non-banks is the market for home mortgage loans. In 2020, 59.2% of home mortgage loans were securitized by Government Sponsored Enterprises (Fannie Mae and Freddie Mac) and an additional 18.4% were securitized by the Fair Housing Administration or the Veterans Administration.[14] These securities are comprised of conforming loans underwritten by banks, credit unions, and non-bank mortgage companies.

For a customer that qualifies for a conforming loan, there will be no difference in their eligibility whether the loan is originated by a bank or a non-bank, because eligibility and loan terms are not defined by the lender. Likewise, there will be a negligible difference in price, because the price of a conforming loan is set by the nationwide market for agency MBS, rather than the credit risk of an individual loan. In short, from the customer's perspective, the mortgage they receive – whether it is from a bank, a credit union, or another non-bank – is identical. The only differentiating factor, and indeed the only plane of competition between these institutions, is the convenience of applying for the loan.

Therefore, to limit the market definition for evaluating a bank merger to only other banks is misguided because their non-bank competitors in the market for home mortgage loans offer an identical product – the agency conforming loan. There are cases where it can be difficult to distinguish between substitutes, but the market for loans is not one of those cases. Home mortgages are used as an example because lenders do not set the underwriting standards, but the same is true in other product lines. A small business owner who needs working capital to buy inventory does not care whether they get a loan from a bank, a credit union, or an online fintech lender. What matters to the business owner are the loan terms and the interest rate of the loan. On these factors, competition between banks and non-bank lenders is head-to-head.

Using the hypothetical monopolist test, even if a bank was the only bank in a given market, it could not profitably raise the interest rate it charged on loans without losing market share. If a bank began to unilaterally raise interest rates without regard to creditworthiness or market rates, customers would turn to credit unions or non-bank lenders to meet their credit needs. This illustrates that they are relevant competitors to banks that must be included in any review of the competitive effects of a merger.

Similarly, in the market for deposits, customers will generally not distinguish between deposits placed in a bank or a credit union. While these deposits differ in the sense that bank deposits are protected by the

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[13] *Supra* note 2, at 29.

[14] Urban Institute, Housing Finance Policy Center, "Housing Finance at a Glance" (Feb. 2021) at p. 8, available at: https://www.urban.org/sites/default/files/publication/103746/housing-finance-at-a-glance-a-monthly-chartbook-february-2021_0.pdf

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FDIC and credit union deposits are protected by the NCUA's Share Insurance Fund, the reality is that, in either case, they are backed up by the federal government up to $250,000. Because of this direct competition, it is does not reflect market reality to exclude credit unions from the market definition when evaluating bank mergers.

In a report on fintech competition published by the Department of the Treasury, the concluded that insured depository institutions compete with non-depository financial institutions in lending, deposits, and payments services. The report concludes by stating that "the consumer finance markets have undergone significant change and evolution since DOJ issued its 1995 Bank Merger Review Guidelines, and since the Bank Merger Act was enacted in 1960. Treasury supports review of bank merger oversight policies in light of ongoing consolidation and the potential waning utility of certain traditional measurements of competition due to the evolving marketplace and limitations of official data sources."[15]

D. Mergers in Industries with a Trend Toward Concentration

Proposed Guideline 8 is based on the principal that mergers should not further a trend toward concentration. The Proposed Guideline states that the government may "rest its case [that a merger will substantially lessen competition] on a showing of even small increases of market share or market concentration in those industries or markets where concentration is already great or has been recently increasing."[16] In our view, this guideline overlooks the fact that a trend towards consolidation may be pro-competitive if it allows smaller institutions to gain the scale required to effectively compete against larger competitors.

In 1986, there were over 14,000 FDIC insured banks in the United States. Today there are around 4,100.[17] Some of that decline can be explained by bank failures, but mergers and acquisitions are responsible for most of the decrease in active bank charters. Based on this data, it appears clear that banking is an industry in a trend towards consolidation. In our view, the bank regulators themselves have a role to play in combating this trend by decreasing the barriers to entry into the banking business and making it easier for banks with proven business models to obtain a *de novo* charter.

While more *de novo* banks would increase competitiveness in the banking industry, we also do not believe that it is the role of regulators to prevent bank mergers that would result in stronger institutions that have the scale necessary to compete with regional and money center banks. As mentioned previously in this letter, a certain amount of scale is often necessary in order to meet the compliance expectations of regulators and the technology expectations of bank customers.

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[15] Department of the Treasury, "U.S. Department of the Treasury Report to the White House Competition Council: Assessing the Impact of New Entrant Non-bank Firms on Competition in Consumer Finance Markets" at p. 103, available at: https://home.treasury.gov/system/files/136/Assessing-the-Impact-of-New-Entrant-Nonbank-Firms.pdf.

[16] *Supra* note 2, at 21.

[17] FDIC, "BankFind Suite: Find Annual Historical Bank Data," available at: https://banks.data.fdic.gov/explore/historical?displayFields=STNAME%2CTOTAL%2CBRANCHES%2CNew_Char&selectedEndDate=2022&selectedReport=CBS&selectedStartDate=1934&selectedStates=0&sortField=YEAR&sortOrder=desc.

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Where regulators should focus their attention is on mergers between the largest banks – those that are Too Big to Fail. The largest banking institutions take risks that no well-managed community bank would dare to take because they know that they will ultimately be bailed out by the federal government if their risks don't pay off. Furthermore, as we saw with the acquisition of First Republic Bank by JP Morgan Chase earlier this year, when large banks get in trouble, regulators will often suspend the rules to allow the big to get bigger. Mergers between large banks, where either of the merging parties exceeds $100 billion in assets, present the greatest risk of creating new Too Big to Fail banks, backed by an implicit subsidy, which actually have the potential to abuse market power to the detriment of smaller banks and customers alike. These large mergers deserve enhanced scrutiny.

IV. Conclusion

In conclusion, our bottom-line recommendation is for the agencies to continue their current practice of issuing a separate set of merger guidelines for bank mergers rather than using the Proposed Guidelines. The Bank Merger Act is evidence that the intent of Congress is for the federal banking regulators to have the lead role in the evaluation of bank mergers, with the Department of Justice in a secondary, advisory role. In our view, this arrangement is appropriate because of the unique place the banking system occupies in the monetary system and the economy.

With that being said, we believe the Department of Justice can and should play an important role in providing analysis and scrutiny of the largest bank mergers. Mergers that create more banks that are Too Big to Fail or that entrench the position of banks already in that category harm consumers and the industry, and they should not be approved absent serious risks to the stability of the financial system. By contrast, mergers between community banks will not usually present significant risks to competition and, in the past, we believe the department has placed too much scrutiny on mergers between small banks. Part of this undue scrutiny is likely the result of the overly narrow market definition that has been used by the department, and the exclusion of credit unions and non-banks from competitive effects analysis except in some narrow circumstances.

Once again, ICBA appreciates the opportunity to comment on the agencies' proposed merger guidelines. We believe the agencies can use these as an opportunity to improve their merger review process in general, and with respect to banks in particular. Please feel free to reach out to me at Mickey.Marshall@icba.org if you have any questions about the positions stated int this letter.

Sincerely,

Mickey Marshall
AVP and Regulatory Counsel

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