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BANK MERGERS AND THE ECONOMIC IMPACTS OF CONSOLIDATION

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BEFORE THE

SUBCOMMITTEE ON ECONOMIC POLICY

OF THE

COMMITTEE ON

BANKING, HOUSING, AND URBAN AFFAIRS

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ON

EXAMINING THE ECONOMIC IMPACTS OF BANK CONSOLIDATION

JULY 12, 2023

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BANK MERGERS AND THE ECONOMIC IMPACTS OF CONSOLIDATION

WEDNESDAY, JULY 12, 2023

U.S. SENATE,
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS,
SUBCOMMITTEE ON ECONOMIC POLICY,
Washington, DC.

The Subcommittee met at 2:30 p.m., in room 538, Dirksen Senate Office Building, Hon. Elizabeth Warren, Chair of the Subcommittee, presiding.

OPENING STATEMENT OF CHAIR ELIZABETH WARREN

Chair WARREN. This hearing will come to order.

Good afternoon. I am pleased to be chairing today's Economic Policy Subcommittee hearing on the economic impacts of bank consolidation. I appreciate our witnesses joining us, and I appreciate Senator Kennedy's partnership in putting this hearing together. Senator Kennedy is on the floor right now giving a speech, but he will join us and told us to go ahead and start.

After the 2008 financial crisis and the subsequent bank bailout, Congress passed the Dodd-Frank Act. The law was designed to ensure that giant banks could never, ever, ever again threaten our economy. But with the collapse of Silicon Valley Bank, Signature Bank, and First Republic Bank—three of the largest bank failures in our Nation's history—two things have become obvious.

First, bank failures remain a serious threat to our economy, putting taxpayers at risk of footing multibillion-dollar bailouts if those banks go under. And second, regulators are courting disaster by continuing to encourage giant banks to grow even bigger. Treating mergers as a solution to financial instability increases instability.

The problem with megabanks goes well beyond the increased risk of blowing up the financial system. As big banks get even bigger, branch closures increase. This reduces the availability of bank services and increases the cost of credit for small businesses and for families.

This problem can be life or death for small businesses that cannot find anyone at a big bank who understands the local economy or the actual business that is applying for credit. The problem is also worse in low-income neighborhoods, where research shows that predatory lenders and check-cashers proliferate as bank consolidation rises.

When banks merge, consolidation has ripple effects that cost jobs, lower household incomes, and slow economic growth in local

economies. Bank consolidation may boost CEO pay and investor profits, but it hurts everyone else's quality of life.

This problem seems obvious and should be easy to fix. Congress spotted the problem long ago, and in 1960 passed the Bank Merger Act to give bank regulators, in consultation with the Department of Justice, the authority to block mergers that reduce competition, harm communities, or are not in the public interest.

Yet somehow, astonishingly, between 2006 and 2021, the Federal Reserve approved more than 3,500 consecutive mergers without denying a single one, a streak that would make Cal Ripken and Lou Gehrig green with envy.

The net result of regulators falling asleep at the switch is that since 1990, the number of banks in the U.S. has declined from over 18,000 to fewer than 5,000.

Meanwhile, the biggest banks, those at the very top, have gotten bigger. In the mid-1990s, the 20 biggest banks in the country held a total, all together, of 15 percent of all bank assets. Today, the top 20 hold more than 65 percent of all bank assets. And the concentration at the very top is even more extreme. The biggest four banks alone hold more assets than the next 75 banks combined.

President Biden, to his credit, recognized this problem and is working to try to fix it. In his July 2021 executive order on competition, he concluded that bank consolidation, quote, "raises costs for consumers, restricts credit for small businesses, and harms low-income communities," end quote, and he ordered banking regulators to update the outdated and failed bank merger review policies.

Two years later, we are finally on the cusp of seeing what those new merger guidelines are going to look like. Last month, Jonathan Kanter, the Justice Department's top antitrust enforcer, indicated that new guidelines would be coming soon, and that the Department would be giving much tougher scrutiny to mergers.

That is the good news. I hope these guidelines are out soon, and you better believe I want them to be tougher than the current rules.

But I am extraordinarily concerned about what we have seen in recent months from banking regulators. When First Republic Bank collapsed in April, the bank was ultimately sold to the biggest bank in America, JPMorgan Chase. That sweetheart deal cost the FDIC Fund \$13 billion. Meanwhile, overnight, the country's biggest bank got \$200 billion bigger.

And what happened to the regulators? The Acting Comptroller of the Currency, Michael Hsu, rubber-stamped the deal in record time. When I asked Mr. Hsu at a hearing in May to explain how this merger was approved, he was unable to give a clear answer.

But the overall picture is even worse. Instead of inattentive regulators who do not use their tools to block increasing consolidation, leaders within the Biden administration seem to be inviting more mergers. In a May 2023 statement before the House Financial Services Committee, Acting Comptroller Hsu reassured banks that the agency would be, quote, "open-minded," close quote, while considering merger proposals. And then earlier this week, he said, quote, "simply prohibiting all mergers of large banks really locks

in the concentration amongst the existing megabanks, and I don't think that's the right answer," end quote.

Treasury Secretary Yellen recently warned that the banking "turmoil" from the collapse of Silicon Valley Bank, Signature Bank, and First Republic might lead to more mergers and that regulators would be, quote, "open to" them. Then the *New York Times* also reported that Secretary Yellen privately told big banks that she would, and I quote, "welcome more mergers."

These comments are stunningly wrongheaded. They indicate that key banking regulators have learned exactly the wrong lessons from the bank failures earlier this year and from the 2008 financial crash before it. Too-big-to-fail banks pose risks to stability of the financial system and increasing banking concentration puts a damper on small business growth across the country.

We need effective regulation and bank supervision that prevent big banks from failing in the first place, and we also need to police bank mergers to ensure that big banks have robust competition to ensure they are serving consumers and small businesses.

I appreciate our witnesses being with us to discuss how we can do that.

So, let me introduce our witnesses and we will get started. First I am pleased to introduce Ms. Morgan Harper, who is Director of Policy and Advocacy at the American Economic Liberties Project. Ms. Harper has years of experience working on economic and consumer issues including at the Consumer Financial Protection Bureau. So, thank you for joining us, Ms. Harper.

Next, joining us virtually we have Dr. Michael Faulkender. Dr. Faulkender is the Dean's Professor of Finance at the University of Maryland and Chief Economist at the America First Policy Institute. Dr. Faulkender is an expert in financial policy, having previously served as Assistant Secretary for Economic Policy at the Treasury Department. Thank you, Dr. Faulkender, for being with us.

And finally we have Ms. Alexa Philo, Senior Banking Policy Analyst for Americans for Financial Reform. Ms. Philo has extensive experience in banking policy and supervision, having served as a bank examiner at the New York Fed and as director of risk control at multiple banks. Thank you, Ms. Philo.

Thank you to all of our witnesses for being with us.

I am going to start with Ms. Harper for your opening statement. Ms. Harper, you are recognized for 5 minutes.

STATEMENT OF MORGAN HARPER, DIRECTOR OF POLICY AND ADVOCACY, AMERICAN ECONOMIC LIBERTIES PROJECT

Ms. HARPER. Great. Well thank you so much Chair Warren, Ranking Member Kennedy, and Members of the Subcommittee. It is a pleasure to be here, and I appreciate the opportunity to testify before you on such an important topic about country's economic future.

As was mentioned, I am the Director of Policy and Advocacy at the American Economic Liberties Project, an organization dedicated to uprooting a primary driver of concentrated economic power—monopolies.

The 2008 global financial crisis made it abundantly clear that megabanks are policy failures. Yet instead of righting those wrong, over the last decade we have made the problem worse. In fact, it is why I left a white-shoe law firm to work as an attorney at the CFPB. There we took on the payday lending industry, debt collectors, and banks that broke the law and cheated the most vulnerable Americans—veterans, the elderly, students, and those earning the lowest incomes.

At the CFPB, we used our legal authorities aggressively to hold lawbreakers accountable. In reality, however, too-big-to-fail banks outmuscled everyone. Even as we enforced the law, they only got bigger and more powerful. These megabanks lied to regulators, cheated consumers, and neglected small businesses with no meaningful consequences. Not only are they too big to fail, they are too big to effectively regulate. Which leads us to today's hearing, as we discuss competing visions for the goals of bank merger policy.

One view is the bigger, the better, that big and small banks alike should swallow competitors in a battle to become one of the last banks standing. Deregulation, lax merger enforcement, and a disregard for our country's bank merger laws over the last several decades have brought us closer to this hyperconsolidated vision.

In 1990, there were 15,000 banks in America. Today there are hardly more than 4,000. The six largest banks control more assets than all others combined. Currently, more than three-quarters of the United States' local banking markets are considered uncompetitive, and more pronounced in rural areas.

Evidence of the harms of bank consolidation is vast. Consolidation has increased the cost and reduced the availability and quality of basic financial services for consumers, disproportionately affecting low-income and minority communities. It has throttled small business formation and lending and introduced greater systemic risks to our financial system.

Regional and community banks' foundational role in local economies means that bank mergers increase unemployment and reduce wages. Branch closures have devastated communities across the country, pushing more Americans into the arms of predatory financial firms, like payday lenders and check cashers.

As the Supreme Court put it in its landmark 1963 Philadelphia National Bank decision, concentration in banking accelerates concentration generally, as bigger banks favor lending to larger incumbent firms. And as we saw in 2008, and again this year, bank consolidation increases systemic risk, threatening new crises which themselves are mass concentration events.

Now some of our top bank regulators, like Treasury Secretary Yellen and Acting Comptroller Hsu, are championing more consolidation, contradicting the competition priorities of their own President. Two days ago, the same day that the Acting Comptroller publicly advocated more bank mergers, his own agency punished Bank of America for illegally cheating its consumers. It was ordered to pay a quarter billion dollars in penalties. This is the definition of too big to fail and too big to effectively regulate.

But there is a different vision for competition in banking, Congress' original vision, laid out in the bank merger statutes, aiming to protect a vibrant ecosystem of small banks that propel the

world's strongest economy. This vision prioritizes competition on the merits, where banks compete for savings and borrowers by offering better rates, easier access to credit for businesses and entrepreneurs, and more services to a broader customer base. This is the kind of competition our banking system was built around, the kind that will lead to a more stable, sustainable, and dynamic economy.

More than 60 years ago, Congress rejected the consolidation-friendly view that some of our financial regulators are now advancing. Our laws did not change. Our banking regulators have. America thrives with a robust and competitive banking sector, and Congress and this Subcommittee have an opportunity to ensure we realize this vision.

For decades we have tried consolidation. This strategy created a worldwide economic crisis in 2008, and we cannot afford another. Congress and bank regulators must enforce our laws to restore fairness and competition in banking.

Thank you again for this opportunity, and I look forward to your questions.

Chair WARREN. Thank you very much. I really appreciate it, Ms. Harper.

So, next we are going to hear from Dr. Faulkender. You are recognized 5 minutes, and I think you are joining us virtually.

STATEMENT OF MICHAEL FAULKENDER, DEAN'S PROFESSOR OF FINANCE AND CHIEF ECONOMIST, UNIVERSITY OF MARYLAND AND AMERICA FIRST POLICY INSTITUTE

Mr. FAULKENDER. Thank you, Chairwoman Warren, Ranking Member Kennedy, and Senators on the Committee for the opportunity to speak to you remotely. I am attending an academic conference in Boston so thank you for this opportunity to speak on a safe, sound, resilient, and growth-facilitating financial system.

I have been a finance professor since 2002, and had the privilege of serving as the Assistant Secretary of the Treasury for Economic Policy during the previous Administration. I am proud to have led the implementation of the Paycheck Protection Program, working closely with community, regional, and large banks, CDFIs, MDIs, credit unions, and fintechs to save millions of Americans from the potential economic ravages of the pandemic.

Historically, our Nation's economic strength has arisen from the ingenuity and dynamism of our private sector. Much of that growth originates from America's small businesses, who often seek credit from local and regional lenders. According to a recent Federal Reserve report, small bank loan portfolios in June of 2021 were more than 13 percent comprised of small business loans, compared to just 6 percent for the largest banks.

To understand why this is the case it is helpful to understand the difference between hard and soft information. FICO scores, debt-to-income ratios, and collateral values are hard information that can just as easily be evaluated from across the country as from across the desk. Soft information, like the unique needs of a local demography or why a particular business model is viable in a particular geography is much more difficult to translate numerically and communicate in a large, hierarchical organization. Access

to financing at the local level depends on financial institutions with local roots.

At the same time, technology has transformed financial services, with ATMs, online, and mobile banking programs and computerized underwriting models. These systems have large fixed-development costs and low variable costs, resulting in enormous returns to scale. An implication of this paradigm is consolidation where four megabanks service nearly 48 percent of the Nation's deposits in 2022.

Such consolidation creates challenges. Bankers in New York and San Francisco do not necessarily understand the local lending needs of Baton Rouge or western Massachusetts. We must ensure a vibrant ecosystem for credit provision to America's thriving small businesses without valid concerns about systemic risk creating extraordinary burdens.

This raises the third major factor, which is the evolving regulatory environment. In my view, a number of reforms are needed. First, Dodd-Frank presumes that financial regulators will stay ahead of the banks. However, if bank supervisors cannot identify and address simple interest rate risks and duration imbalances, how can we rely upon them to stave off more complicated risks?

Second, the system benefits from different banks pursuing different technologies, customer segments, and underwriting models. When regulators replace the judgment of the banks with their own, regulatory failures that, for instance, overemphasize credit risk and underemphasize interest rate risk, cause common shocks that put the entire system in greater jeopardy. For our largest institutions, I believe the solution is greater capital, not greater bureaucracy.

Third, the systemic risk exception on deposit insurance has proven problematic. Statutory language explicitly or even implicitly saying that large banks have a more robust deposit guarantee than community and regional banks causes exactly the consolidation that policymakers should avoid. While we should perhaps guarantee non-interest-bearing transaction account so that American workers can be sure paychecks will clear, nowhere should law or policy provide differential deposit insurance based on bank size.

Fourth, uniformly applying regulation and supervisory tactics to all banks when only the largest pose particular types of risk make small and regional banks less competitive. Bank supervisors should not request that small banks comply with, quote, "best practices," end quote, that are not mandated.

Finally, bank regulation must make it easier for new banks to enter. Since 2010, only 62 new FDIC-insured banks have been chartered in the United States. Creating stricter mandates for our Nation's banks may, instead, cause marginal activities to go toward shadow banks without making the Nation's financial systems safer. Regulators should work with industry and academics to identify the impediments to de novo banking so that greater bank entry might partially offset consolidation.

Our banking system must continue improving accessing, lowering costs, and safeguarding financial information. Economies of scale mean that there will be several large institutions. Policymakers and regulators must ensure that there are enough of these banks to maintain significant competition. Regarding systemic risk,

regulators will never have the information and sophistication necessary to stay ahead of the banks' activities. Instead, much of what regulators monitor should be left to the owners of the banks. Let capital do the work of the regulators. This would greatly reduce compliance burdens on small and regional banks that cannot afford the fixed costs of the regulatory apparatus and still compete.

I look forward to participating in today's hearing. Thank you.

Chair WARREN. Thank you, Mr. Faulkender. I really appreciate your remarks here.

And now we go to Ms. Philo. You are recognized for 5 minutes.

**STATEMENT OF ALEXA PHILO, SENIOR POLICY ANALYST,
AMERICANS FOR FINANCIAL REFORM**

Ms. PHILO. Good afternoon, and thank you Chair Warren and Ranking Member Kennedy for the opportunity to testify. I want to talk about the dangers of excessive concentration and the need for the banking agencies to swiftly update and apply their bank merger review frameworks.

As you noted, President Biden issued an executive order in 2021 to promote competition in the economy. It encouraged the agencies to review their practices and adopt a plan no later than 180 days from the order, and yet here we are, 2 years later, and the agencies have yet to publish new guidelines.

We at AFR, Americans for Financial Reform, are deeply concerned about the concentrated power in banking and the wave of bank mergers and acquisitions that facilitated it. Bank consolidation has produced historically high concentration in the U.S. financial sector, the number of U.S. banks has plummeted from the '80s to today, and you mentioned a number of stats here that sort of reinforce that point.

The agencies' history of rubber-stamping bank mergers has come at a great cost, with marginalized and rural communities disproportionately affected. The Bank Merger Act and BHC Act require the agencies to consider convenience and the needs of the community, and yet bank mergers have reduced availability of credit, increased fees for basic banking services, and lowered interest rates offered to depositors. These adverse effects are even more pronounced in communities of color, low- and medium-income communities where bank consolidation has led to significant branch closures.

Bank mergers continue to drive large numbers of branch closures, and this disparately affects places where few branches existed in the first place, especially rural areas, especially low-income urban areas.

Bank mergers' harmful effects also extend to small businesses, as we have talked about. Community banks have traditionally specialized in lending to local entrepreneurs and farmers. When banks consolidate, small business lending declines as bigger banks tend to serve larger commercial customers.

Bank mergers exacerbate systemic risk. Due to recent mergers, PNC, Truist, and Capital One are now bigger than Washington Mutual, Countrywide, and Nat City when they failed in the 2008 financial crisis. Large bank mergers can exacerbate existing prob-

lems, such as the too-big-to-fail dynamic, as well as related problems such as when banks become too big to manage.

The American public would be better served by the agencies evaluating emergency sales such as those that we saw through a lens broader than just the least cost to the insurance fund, including resulting effects on financial stability, ability to manage the combined entity, anticompetitive impacts, and other negative economic consequences not beneficial to communities served or the economy. The least cost calculation criteria should also be more transparent.

In terms of needed actions, those opposed would have us believe that we need deregulation to check concentration, pointing to failures to supervise SVB. We disagree. A supervisory failure does not indict all supervision. It argues for stronger regulation and effective supervision.

Also, regulations promote competition, level playing fields, and oversee systemic risk—I am sorry. I want to apologize. I want to restate.

Also, regulations to promote competition, level playing fields, and oversee systemic risk do not categorically squelch innovation and diversity of business models. They can, in fact, do the opposite.

Among AFR's proposals, we have listed a few here and I have more in my written testimony: pausing merger approvals until guidelines are strengthened; conducting a retrospective analysis on the impact of prior banking mergers; fulfilling the obligation to determine how a proposed merger will benefit the needs of the community with a robust community benefit agreement.

This assessment should consider other relevant factors in addition to the bank's CRA rating, such as guaranteeing that a consumer merger is in the public interest by requiring CFPB approval, requiring disclosure of discussions between the institutions and regulators, and so on and so forth.

To conclude, the above proposals are needed to protect the American public and combat the hands-off approach to merger reviews that has resulted in increased consolidation and inflicted substantial harm on the economy, small businesses, and communities, rural and Black, Indigenous, people of color communities.

Thank you for allowing me to testify today. I greatly appreciate it.

Chair WARREN. Thank you, Ms. Philo. I really appreciate your comments.

So, I am going to start with 5 minutes, first round of questions.

So, the vast majority of banks that disappeared over the last few decades were not financial giants. They were small banks with deep roots in their communities. These are the banks that know local communities. These are the banks that know local neighborhoods, know local businesses. These are the banks that do the painstaking local lending that is a lifeline for so many small businesses. But those local banks are the ones that are disappearing.

Since the mid 1990s, the share of banking assets and lending markets controlled by community banks has been cut in half. In just the last 15 years, the number of community banks has shrunk by more than 40 percent. Today, one-third of all rural counties no longer have a local bank.

The result is that more communities in America, especially rural communities and communities of color, have little choice but to turn to big banks for checking accounts, loans, and other financial services. This increases costs for families and small businesses, and it has major consequences for the entire economy.

So, Ms. Harper, let me ask you, what happens to a community when the last small bank in town closes up shop?

Ms. HARPER. Thank you for the question, Senator, and I am glad that you actually used the word “lifeline,” because when that last community bank, small bank leaves, it truly does take the heartbeat of the local economy with it. These small banks are, as you mentioned, serving and meeting the needs of small businesses, which fuel the rest of that local economy, and without them we see job losses, we see less employment, we see less dynamism in that economy.

And then also we see the impact on consumers. When those services go away for consumers as well, they are left with higher-priced services, but then also it lays the groundwork for some of those predatory firms that I mentioned in my introductory statements—payday lenders, check cashers—that once in that trap, as we know, God help you, because then that opens up the door for debt collectors and possibly even eviction.

So, it is extremely devastating when these small banks go away, and that is why it is so important we are having this hearing today, to make sure our bank merger policy does not exacerbate the problem.

Chair WARREN. All right. Really powerful point. Let me see if I can pull this just a little bit and focus again on small businesses. So, let’s say I own a small bakery in Sturbridge, Massachusetts, and I have an idea to open another bakery in another town, but I need a loan to be able to do that. Now maybe I had a hard time during the pandemic, my profits may have been spotty for a period of time, but I am optimistic that a new storefront is the best long-term investment for my business.

Do you think I have a better chance of getting that loan from my local community banker, if I have one, than, say, Wells Fargo, that just moved into town?

Ms. HARPER. Oh, absolutely. I mean, big banks are set up to serve larger clients. That is where they make the most profit, and that is where their incentives lie. And small banks have the time, have the incentive to do the type of relationship lending that is going to serve small businesses. And we also do not need to think about those in a hypothetical. The data bears out that, in fact, the largest banks are only providing about 18 percent of small business loans, where we see that community banks are providing about 50 percent.

Chair WARREN. Yeah, so think about that—wait—for one more minute. So, here they control all these assets, but in terms of how much of that money is making it back into communities and into small businesses, you are telling me—do the numbers one more time.

Ms. HARPER. Only 18 percent of the small business loans are actually coming from the larger financial institutions.

Chair WARREN. So, 82 percent are coming from the smaller financial institutions, community banks, and others.

Ms. HARPER. And others, yes. But at least 50 percent are coming from smaller community banks. And, you know, the other piece of evidence that I would point to is the PPP program. In terms of the pandemic, that was an opportunity where, in moments of extreme need by our small business community, which I think we are all aware of, the big banks did not step up. They were only providing 3 percent of those loans, and in fact, the community banks were providing about 30 percent.

Chair WARREN. Yeah. All right. Very interesting.

So, I try to think about when community banks are gobbled up by bigger banks, small businesses, which generate about 44 percent of all U.S. economic activity and create about two-thirds of all jobs in this country, lose their primary source of capital. And that means less economic growth and more concentration throughout the economy.

So, when Treasury Secretary Yellen and Acting Comptroller Hsu effectively put up a billboard inviting more big bank mergers, they claim it will help our financial system be safer, that that is the reason they are doing this. So, I want to probe that just a little bit here.

Ms. PHILO, we have decades of academic research on the relationship between mergers, bank concentration, and key indicators of financial stability. So, does this research show that mergers are the way to increase stability in the banking sector?

Ms. PHILO. Absolutely not, Senator. We saw, in the run-up to the 2008 crisis, in particular, but we have seen repeatedly in crisis environments that big bank merger do increase the risk of financial crisis. You have increasing complexity with the combining of large institutions. You have increase in concentrations, increase in interconnectedness and being entwined with the financial system.

So, there are studies that actually document and analyze this, one, in particular, that is often referred to, showing that one large bank merger has negative repercussions greater than five combined smaller institutions with the same deposits.

Chair WARREN. Same deposit amount, the economic impact of the failure of one big bank is far greater than the economic impact of five smaller banks, even though the same dollar number of deposits is affected. Is that right?

Ms. PHILO. That is what the studies show, and these studies include from our agency partners as well. So, I mean, this is sort of well understood and documented.

Chair WARREN. OK. So, I also understand, from what you are saying, that mergers increase the risk of creating more banks that are too big to fail, right, because we keep moving up, bigger, bigger here, leaving taxpayers on the hook for bailing them out when they blow up and taking the economy down with them. So, that is more banks that can get away with playing the "tails, I win, heads, you lose" game that banks have played for a very long time.

Ms. Harper, do you agree with Secretary Yellen and Acting Comptroller Hsu that more mergers would make our financial system safer?

Ms. HARPER. No, not at all, and it is extremely disconcerting to hear them suggest that.

Chair WARREN. And how about you, Ms. Philo?

Ms. PHILO. No, exactly. Similar answer. It is concerning.

Chair WARREN. OK. Secretary Yellen and Acting Comptroller Hsu have it exactly backwards. Bank consolidation does not make our financial system and economy stronger. It makes them weaker. And if we are serious about protecting community banks and preventing taxpayer bailouts, then we need to fix the root of the problem, consolidation. Bank consolidation harms consumers, it deprives small businesses of capital, and it creates an ever-growing number of too-big-to-fail banks.

Thank you. Senator Reed.

Senator REED. Thank you very much, Madam Chairman, and thank you to the witnesses.

Ms. Philo, we have seen regulatory approvals of private equity-backed acquisitions of open insolvent banks. Why should banking agencies be skeptical of approving these merger acquisitions or applications, and what specific elements of private equity model are dangerous when applied to banking?

Ms. PHILO. Thank you, Senator Reed, for the opportunity to speak to this. It is deeply concerning, and I am going to quote a part of a letter the AFR put out there on April 21, 2022. "The private equity industry controls an ever-increasing portion of the U.S. economy. The extractive business model requires it acquire and consume more businesses and sectors every year. It has increased in size eightfold over the past two decades, from \$700 billion in global assets in 2000, to \$5.8 trillion in 2018."

So, I could continue, but I think what we have seen is private equity firms have different incentives, and when they come in and they acquire a bank or a health care organization or an insurance company, there is a propensity to put profit first and to squeeze as much profitability out of the arrangement as possible. And as we know, in the banking sector, that is not at all the intention, and I think obviously in health care as well.

Senator REED. And typically these banks are community banks, and with that kind of leadership, which is not community oriented, you do not get the same kind of attention to people, the people that are your customers. Is that accurate?

Ms. PHILO. I think that is exactly right. Private equity firms acquiring a community bank, coming in will not have that same commitment to the local economy, will not have the same understanding of the local economy, and will not prioritize it because it will not be aligned, most likely, with their efforts to increase the profitability of the business.

Senator REED. And there is another aspect, too, is that in situations of failed banks the FDIC will entertain offers for partial ownership by private equity. The alternative is to sell the institution to a peer bank. It seems, again, the same dangers of private equity we talked about in a full acquisition would be inherent in buying a piece of a bank. Is that accurate?

Ms. PHILO. That is accurate. I think you would have to be particularly vigilant in that context because, first, least cost could mean extremely inappropriate practices and put customers at risk

in terms of the financial services and products offered. So, I do believe you will get a mismatch in terms of the objective of the banking organization that has been acquired and the needs of the community.

Senator REED. Let me change subjects for a moment. In the Dodd-Frank bill, which I participated in, we set a rule that the financial stability of the United States has to be considered in the merger calculation, the impact of the merger on the financial stability of the United States. But this factor has been unevenly apprised by agencies. Should that be more rigorous and transparent in establishing the criteria for this financial stability factor and explaining why the merger does not impact?

Ms. PHILO. I do believe that we should, and I think that is a really key lesson coming off of the 2023 crisis. SVB, in particular, Silicon Valley Bank, made an acquisition in the years prior to its failure, and the Federal Reserve, in approving that, did not, spoke to financial stability, signed off from a financial stability perspective, but said nothing about how that came across, what kind of data went into it. So, I think that is absolutely a priority, Senator.

Senator REED. Well, let me ask a question for both the witnesses here present. How does current bank merger framework evaluate AML practices, anti-money laundering practices, and cybersecurity risks when they look at the mergers? Ms. Harper.

Ms. HARPER. Well, and I think you are accurately identifying, that is one of the factors that should be considered in any merger review. But I also want to re-emphasize, and building off of my colleague's comments, that there is a particular role that banks in our economy are supposed to play. It is a public role, and they are chartered to fulfill that role, which is moving capital and serving the interests of small businesses and consumers. And what we know, based on all of the evidence from the past several decades, where we have seen pulling away of enforcing the types of rules that would require considering things like money laundering is that it is leaving our financial system less stable and creating more harms for consumers and small businesses.

So, that is why, at this point, we should have a very strong presumption against approval of mergers, and we really need to come back to the original vision of Congress to make sure that we are considering a whole set of harms in analyzing individual transactions.

Senator REED. Thank you. Ms. Philo, your comments, on cybersecurity in particular.

Ms. PHILO. Yes. I think it is a great question because there is no requirement to consider issues like that, and I think that it is an important part of the reforms that we are looking for to make sure that those tough questions are asked and that they are answered, both with the appropriate data and disclosure.

Senator REED. Thank you very much. Thank you, Madam Chairman.

Chair WARREN. Thank you. I appreciate it, Senator Reed.

So, I want to take a look at another issue, and that is the rapid consolidation of our banking system is not the result of some natural phenomenon, like gravity, that it just had to happen. It is the consequence of deliberate decisions by financial regulators that

have made it easier for big banks to grow bigger by gobbling up their competitors. One place where these decisions have the biggest impact is in the bank merger review process, which determines whether a bank can merge with or buy up another bank.

So, Ms. Philo, you have seen this process up close, so I thought maybe we could just walk through the basics on it. Let's go back to the bakery example here. So, if I own a bakery and I want to buy another bakery, two little bakeries in two little towns, and I have got the money, I can just go buy the other bakery. I can cut a deal with the current owner, the owner wants to retire, I can buy the bakery.

That sounds fine, but if a bank wants to buy up another bank or merge with another bank, can they just go out and close the sale the same way they would if it were a bakery buying another bakery?

Ms. PHILO. Absolutely not, Senator. It is a very complex set of regulations and guidelines, and as we know, banking organizations, not just the ultra-large, are highly complex.

So, no, banks merging is much more complex. They need authorization from the relevant agencies, whoever is their primary regulator.

Chair WARREN. So, they have to go to their regulator.

Ms. PHILO. Correct.

Chair WARREN. They have to tell their regulator what they want to do, fill out an application to be able to do it.

Ms. PHILO. A very elaborate application, if I might add. There is a very intensive, as you know, focus on deposits, and yet there is a vast array of other things considered as well. And there is a period of, one might expect, you know, a year-plus where there is a review and an engagement with the regulators to review the merger.

Chair WARREN. OK. So, assuming we have a federally chartered bank here, which most banks are. So, the three regulators, the ones that you might have here, the OCC, the FDIC, or the Fed, depending on the size of the bank and who is the primary regulator, actually has to go through, look at all this information, and takes a year or so to go over the books to understand the local community and to look through before there is any approval of going forward with this bank merger. Is that right?

Ms. PHILO. That is correct. That is correct. There is also a DOJ review.

Chair WARREN. So, there is more.

Ms. PHILO. There is more.

Chair WARREN. That is not enough by itself. Go ahead.

Ms. PHILO. Absolutely. Once that has been completed and they worked out the application, the Department of Justice also reviews the application for its competitive effects.

Chair WARREN. OK. All right. So, a lot going on here. So DOJ Antitrust Division takes a look at it after the banking regulators have, and they have both got to sign off before you can go forward. OK. So, we have established that banks are a little different than bakeries.

Ms. PHILO. A little different.

Chair WARREN. Got it. So, banks file their application to merge and both DOJ, Department of Justice, and financial regulators are taking a look. Now the DOJ's Antitrust Division reviews all these deals and looks at them for anti-competitive effects, but a purchasing bank, the bank that is doing the buying, their main Federal regulator, that is their banking regulator, is ultimately responsible for approving or denying a deal. Is that right? So, Antitrust looks at it for its anti-competitive effects, but the banking regulator is the one who gives the final yes or no. Is that right?

Ms. PHILO. That is correct.

Chair WARREN. OK. I just want to make sure I have got this.

So here is what I want to focus on. Since it is the banking regulators that have both the initial information and the ultimate say-so on this, what are the banking regulators looking at? You have been in this world. What it is that you would evaluate if you were a banking regulator and asked to approve the merger of two banks? Talk to me about the kind of things you would be looking at.

Ms. PHILO. Absolutely. I think there is a great deal of discussion about deposits, and clearly that is a focus.

Chair WARREN. So, you would look at deposits.

Ms. PHILO. Yes, but there is a great deal more. Also we have talked about the anti-competitive effects. But we would quickly go to financial stability, especially for the larger banking organizations. We would also go to public interests and the benefit to customers and communities. And then last, and these are in the guidelines and required, financial managerial resources. So, is the firm's oversight and apparatus, the lines of defense and all that in order, and other financial resources there.

Chair WARREN. OK. So, what you are supposed to look at is actually set out in these merger review guidelines, right, and as you say, it is things like does it harm consumers, can management really be counted on here to run it, is the bank going to be stable, is it going to destabilize the access to banking in the region. And if the regulators believe that any of those harms could be caused by the merger, what are they supposed to do?

Ms. PHILO. They are supposed to factor that into the assessment.

Chair WARREN. Factor them into what?

Ms. PHILO. Into the assessment of whether to approve the acquisition.

Chair WARREN. And at least in theory, if there are problems, are they supposed to approve?

Ms. PHILO. No.

Chair WARREN. I want to make clear, this is the guidelines. At the end of the day they are not about saying, "Boy, there are a lot of problems, but go ahead. Have a great time."

Ms. PHILO. Right.

Chair WARREN. OK. So, they are supposed to deny.

So, outlining this process that is designed to make sure that when a bank merges with another bank that is does not endanger our financial system, it does not harm consumers, it does not harm small businesses and their access to credit. These are very important goals.

So, that suggests to me there should be a really high bar for approving a merger, and yet, let's look at the data. Somehow the

FDIC, the OCC, and the Fed, the three regulators here, have basically never seen a merger they did not love. Since 2013, the FDIC has received more than 1,100 bank merger applications, and how many did they formally deny? A nice round number—zero.

What about the OCC? Since 2013, the OCC has received nearly 500 merger applications. How many of these did the OCC deny? Answer, zero.

And things do not look great at the Fed either. Since 2006 and 2021, a span of more than 15 years, the Fed has approved more than 3,500 merger applications and denied zero.

In fact, out of the thousands of merger applications that have been filed over the last 20 years, just 1, and that was last year, was formally denied by regulators.

So, let me ask the question this way. In fact, let's bring you in, Dr. Faulkender. Is it your view that out of the thousands of mergers that have been approved over the last 20 years that none of them, or only one of them posed a threat to competition, a risk to financial stability, reduced options for consumers, more constrained borrowing for small businesses, or any of the other factors that regulators are required to consider?

Mr. FAULKENDER. Thank you for the question, Senator. You know, I went to graduate school because I worked at a commercial bank and we got acquired, and that was what spurred me to go get a Ph.D. And I can tell you that what happened in that instance was that there was excessive consolidation in the area, and so what the regulators required was that there be spinoffs or selloffs, divestitures of certain branches.

And so it is a little bit more complicated that the mergers, that none of them are denied. Usually what happens is that if they are approved, they are approved with restrictions like divestitures, in order to make sure that there is still sufficient local competition.

Chair WARREN. And are we confident that that is exactly what has happened?

Mr. FAULKENDER. I have not reviewed every one of them. And let me say, Senator, I think my testimony revealed that I am very concerned about the lack of local information that is lost with acquisitions. I just hope we get a chance to also, though, talk about that that the biggest thing small banks suffer from is their inability to compete on technology. And so I think that where we could maybe have some conversation is how do we lower the cost of small and community banks competing with large banks on technology because of the economies of scale.

Chair WARREN. So, I think that is a very important point, Dr. Faulkender, and certainly something that I am sure folks in the banking industry who are trying to run these community banks are talking about.

But let's face it. As long as the big boys are out there gobbling them up, there is not much time to talk about how you spend energy and resources building up your technology. When you are getting swallowed up, and the community banks are disappearing, as we see from the data here that they are, I think the consequences are pretty obvious, and I hope we can help the community banks.

But part of this starts at the merger review level. So let me ask you, Ms. Philo, about your view about this. Of all these banks for

which only one, in all this period of time, was formally denied a merger approval, do you think that none of them posed any risk or that there were enough other conditions put in place so that every one of the criteria were met, the criteria that are currently laid out in the merger review guidelines?

Ms. PHILO. I believe it would be hard to say that every single instance that we have from historically going back so many decades would have met every one of them, according to their specific criteria. I think that would be a stretch to imagine that.

Chair WARREN. Yeah. And, you know, I get it. People make mistakes. Regulators make mistakes. Human beings make mistakes. I understand that. But notice, if they are just random mistakes they will be mistakes in both directions. There will be some times when mergers will be disapproved that maybe would have been OK and not posed a risk, and there will be some times one will slip through that actually does cause harm to consumers or that cuts access to credit for small businesses.

But when you see this kind of an approval rate, that is effectively 99.99 percent approval rate, you really have to say the system is tilted the wrong way, that we are not using a high enough bar in the current merger review guidelines.

So, let me just do one more quick one and then I will give this over to Senator Van Hollen, and that is to focus in on a merger review guideline process that has effectively become a rubber stamp, and the banks know that it is a rubber stamp. Sure, there may be a little bit of song and dance around, "Oh, we promise to do this in the local community," or "We promise to do that," but no indication there is any particular follow-up on this.

So, in that context, President Biden, early in his term, called for tougher standards that apply real scrutiny to bank mergers. Ms. Harper, do you agree with President Biden that our bank merger guidelines need to be toughened up in order to keep both consumers, small businesses, and our financial system safe?

Ms. HARPER. Yes, and it is very encouraging, both what we are seeing from President Biden and also from the Department of Justice Antitrust Division that they intend to apply what is the statutory obligation, which is a holistic assessment of harms from any potential merger.

Chair WARREN. That they are actually going to follow the law.

Ms. HARPER. That is an idea, right?

Chair WARREN. There we go. Ms. Philo, how about you. Do you agree with President Biden on this?

Ms. PHILO. I absolutely agree with President Biden.

Chair WARREN. Good. You know, I am extremely disappointed that when I asked our nominees to the Federal Reserve board this same question recently, they refused to give a straight answer. I am seriously concerned that we are being presented with nominees to key roles regulating banks who cannot clearly state that they agree with President Biden that concentration in the banking industry is a serious problem.

It is clear that our bank merger rules need to be tougher, and that I why I will soon reintroduce my Bank Merger Review Modernization Act, which would strengthen and modernize the bank merger review guidelines so that regulators actually do their job of

protecting small banks, consumers, and our financial system from unchecked consolidation.

I will keep pushing Congress to pass this bill, but this is one time that regulators do not have to wait on Congress. I am glad that banking regulators and the DOJ are following President Biden's directive to strengthen the bank merger review guidelines, which they can do under current law. Even so, it is time to get this review finished and get it out the door. We need our regulators to deliver even before those guidelines are out and certainly once the guidelines come out.

Senator Van Hollen.

Senator VAN HOLLEN. Thank you, Senator Warren, and thank you for holding this hearing. Thank you to all our witnesses. Dr. Faulkender, it is great to have a University of Maryland Terp as part of the witness panel here.

And I have been able to listen a little bit from my office to some of the testimony, and it reinforces the understanding that access to banking services is a really important indicator of wealth-building and prospects for being able to have a successful life where you can support your family. Obviously, that includes credit scores, access to lending to purchase a home, and other things like that in the testimony. And I think, Ms. Harper, you made the point that during the pandemic the PPP program became much more successful when we opened the doors and made it very clear that more community-based banks, CDFIs, and other entities should be conduits for the emergency funding. And you also cited the information about small business loans, I think 50 percent of small business loans coming from community-based banks versus the bigger banks.

So, clearly access to community banking and local banking services is important for a variety of reasons, which is why I have been also troubled by the consolidation in this sector. If you look at the National Community Reinvestment Coalition reports they found that over the course of 2017 to 2021, the U.S. saw historic levels of bank branch closures. And the Baltimore metro area experienced the second-highest rate of branch closures during this period of time, losing 96 branches.

And yes, we have, of course, seen more of a transition to technology, but we also know that there are lots of individuals—the elderly and lower-income individuals—who rely on that direct community banking relationship.

So, my question to you, and I think you alluded to it earlier, Ms. Harper, is, in addition to denying individuals access to these sources of lending within the community, if that is not there they often do turn to predatory lenders and others that take advantage of them, and, in fact, that ends up costing them a lot more in the long run. Can you just elaborate a little bit more on that point?

Ms. HARPER. Absolutely, and thank you for the question, Senator. We do see that these harms of consolidation are exacerbated in communities where we have mostly minorities and rural areas as well, and those harms are vast. As you said, that I mentioned in my introductory remarks, that we see increased fees, junk fees that are imposed, even if we are just talking about the traditional

system that is more likely to occur and disproportionately affects these communities.

But then also, you know, rejection of mortgages, for example. A lot of lower-income folks who might be more likely to rely on an FHA-backed loan, rates of approval will decrease based on this lack of access to banking services.

And so it is very critical that we do what we can to get back to congressional intent here, to recognize the harm.

And I do want to get back to one of the references that the professor mentioned on economies of scale. What we do not see is evidence that we are addressing any of these harms of the economies of scale. So great to have better technology, but if it is ending up like what we saw in the merger of BB&T and SunTrust, that you immediately are closing 800 branches, that you have customers that are so upset because they cannot access good customer service that they are going to local news to complain about it, then what are we really getting here, and are we applying the right analysis in determining whether or not these transactions are actually going to, again, get back to the statutory obligation that they are not promoting anti-competitive behavior and that they are serving the public role that the banking system is supposed to be fulfilling.

Senator VAN HOLLEN. Right. No, I think those are all good points, and I think the other challenge we have got, of course, is that when it comes to the nonbanking or the fintech sector, there are some good actors there but there are also many that take advantage of the fact that they do not have the same level of standards and regulations. In fact, obviously, that applies sector-wide. Some exploit that more than others.

But can you just talk to the fact that one way maybe to a little better even the playing field here would be to apply some of the similar standards and rules to the nonbanking, fintech sector.

Ms. HARPER. Yeah. I think we definitely need to have level playing field in how we are thinking about all entities that are providing financial services to consumers. But ultimately the best way to create that competitive environment is exactly what the topic of today's hearing is, which is strong bank merger policy that is not exacerbating the consolidation, that is driving consumers to, which you rightly point out. There are some good products, but some that are more likely to hit when those banks go away, when those branch closures happen, are those that are predatory like payday lending and check cashing, et cetera.

And so it is very important that we get this right, but it is not complicated. We have the rules of the road. Congress figured it out, and we just need to make sure we have banking regulators that are going to follow that course.

Senator VAN HOLLEN. Thank you. Thank you all for your testimony.

Chair WARREN. Thank you for questions.

So, bank regulators' unwillingness to block bank mergers over the last few decades has made our banking system more concentrated. Bank regulators have also made the too-big-to-fail problem even worse.

During the 2008 crash, regulators arranged shotgun marriages between our Nation's biggest banks, which enhanced the domi-

nance of the behemoths that rule our financial system today. In fact, JPMorgan can thank the regulators for its status as our Nation's biggest banks. Regulators arranged for JPMorgan to acquire Washington Mutual when it failed in 2008, thus catapulting JPMorgan to the top of the banking heap. A few months ago, America was treated to rerun of the get-bigger-though-marriage show. The regulators approved JPMorgan's purchase of First Republic, so that America's biggest bank got \$200 million bigger.

Now Ms. Philo, when a troubled bank is on the verge of failing and the FDIC steps in, is the FDIC required to sell off the entire bank to another bank?

Ms. PHILO. No. It is required to look at least cost, but it is not required to sell the failed bank to another bank.

Chair WARREN. So, what else could it have done?

Ms. PHILO. It should evaluate the selling of the parts of the bank.

Chair WARREN. So, it could liquidate the bank.

Ms. PHILO. Correct.

Chair WARREN. It could sell it for parts.

Ms. PHILO. Correct.

Chair WARREN. Or it could sell it in whole to another bidder.

Ms. PHILO. Correct.

Chair WARREN. And when it is choosing among those options, what is it supposed to consider?

Ms. PHILO. It is supposed to consider the least cost, and that is a statutory requirement. And one of the challenges is that is a very narrow requirement. That is a requirement that focuses explicitly on the dollars and cents aspect, the cost, if you will, in currency terms. And yet what we are also realizing is critical is the need to consider financial stability, competition, and other issues that also have costs. So this focus on the dollars and cents part of the cost is concerning.

Chair WARREN. OK. So let me turn to you again, Dr. Faulkender. According to the least-cost test, if two banks put in a bid to buy the failed bank's assets and both of those amounts are less than the Deposit Insurance Fund would spend liquidating the bank, the FDIC would have to go with one of those bank's bids. Is that correct? That is what the least-cost test means?

Mr. FAULKENDER. That is likewise my understanding, yes.

Chair WARREN. OK. So, Ms. Philo, if a bank, let's just say Bank A, will take over the failed bank assets with a bid that—we could talk about these in bids, like someone is going to make money here. That is not actually what is going to happen—with a bid that results in a \$10 billion hit to the Deposit Insurance Fund, and Bank B would take over the failed bank with a bid that would cost the fund \$11 billion, the FDIC, by law, has to accept which bid?

Ms. PHILO. The lower one.

Chair WARREN. The lower bid. The one that would cost the FDIC \$10 billion rather than the one that would cost it \$11 billion. Is that right?

Ms. PHILO. Correct.

Chair WARREN. OK. All right. And you were saying earlier, and that is because the only thing that really comes into this part of

the analysis is the dollars and cents part of this, right, just the dollars, on what is going to happen in this purchase.

OK. So the question is, does the FDIC need more flexibility to evaluate options during the resolution process? And that is what I am trying to do in the Bank Merger Modernization Review Act. But I want to see if I can dig a little bit deeper into how the FDIC arrives at its conclusions right now. I think they ought to be able to consider some other factors, but let's just focus on what the law is right now.

Ms. Philo, when the FDIC is comparing the loss to the Deposit Insurance Fund, that it is expected to result, from different resolution options—we have Bank A bidding and Bank B bidding—how does it actually determine those numbers, that one is going to cost \$10 billion and one is going to cost \$11 billion?

Ms. PHILO. Sure. It needs to do the analysis and compare all alternatives. It needs to model the outcomes and compare all of the costs related with the transaction. This includes a present value basis, so traditional merger finance, a realistic discount rate, appropriate assumptions, and I think that is really key.

Chair WARREN. Oh, I love that. Only the appropriate assumptions. OK.

Ms. PHILO. You know, assumptions like the assumed interest rate obviously is a big one, assumptions around asset recovery, asset holding costs, contingent liabilities, et cetera, et cetera. The list goes on. Assumptions are important.

Chair WARREN. OK. So throughout this, though, it sounds like, depending on what assumptions you make on each one of these you are going to end up with somewhat different numbers, a lot of unknowns in this process, especially when we consider that banks may fail very quickly and that regulators are up all night scrambling to figure out what they are going to do.

The FDIC may not have all of the information that it needs to accurately estimate the failing bank's assets, its liabilities, get them appropriately evaluated, and any tweak that you make to the assumptions could have a big impact on the ultimate outcome.

So Ms. Philo, from your experience, is there a lot of room for these estimates to vary, or are these estimates, do they turn out to be pretty precise? What is your sense?

Ms. PHILO. These estimates absolutely do vary, and they are just that. They are estimates. Oftentimes, in traditional environment, they are based on using several methods and bringing them to bear and coming up with as much precision as possible. And yet there is a lot of variability, and we have seen that.

We have seen that in the valuation, for example, of Merrill Lynch in the heat of the 2008 crisis. To your point, the valuation takes place not only under very extremely short timeframes, but in that environment, you know, crashing markets. So it is extremely difficult to value, and we have seen the results of that being extremely difficult, in terms of revisions after the fact, I think.

Chair WARREN. Yeah. I always think that the sample, I do not know if you remember it, but on the Wachovia Bank during the 2009 crisis, the FDIC's own numbers, their own staff said that the Wells Fargo bid would result in a cost to the fund of somewhere

between \$5.6 and \$7.2 billion. That is a \$1.6 billion range, but that is a lot of money in that range.

So, that is how challenging this is for the regulator.

I want to hit one last question here, Ms. Philo. Does the public have good information on the calculations that the FDIC made when comparing resolution options for a transaction?

Ms. PHILO. No, regrettably, we do not have details on the assumptions and the estimates that we would like to have, I think. We have had to take their word for it, essentially.

Chair WARREN. Yeah. So that is the position we are in. It just kind of turns into black box at the end of the day.

You know, I do not think we ought to be taking the FDIC at its word. When making decisions about whether to sell a failed bank to a financial giant, or to a slightly smaller giant, the FDIC is relying on highly malleable estimates, not on gospel, and they get a free pass by saying their models prove that that was the least-cost alternative and the only way to resolve the bank under the law.

The FDIC needs to provide more transparency around how it makes these decisions. If it truly was the case that a deal blew a \$13 billion hole in the Deposit Insurance Fund, which is what happened when the FDIC allowed JPMorgan to book a \$3 billion profit on the deal when it was able to purchase First Republic, then the FDIC should have to show its math and prove that that really was the least-cost alternative.

Every time a financial crisis hits, all the rules that are intended to protect against greater banking consolidation seem to evaporate, even though banking consolidation is what got into trouble in the first place. More big bank mergers is not the solution here, and we need regulators who understand that.

I want to thank our witnesses for being with us today, for participating in our hearing. Questions for the record are due 1 week from today. That is Wednesday, July 19th. For our witnesses, once those questions are in, you will have 45 days to respond to any questions.

Again, thank you, and before I close I would like to enter into the record statements from Better Markets, the Massachusetts Bankers Association, the Credit Union National Association, and the Bank Policy Institute. We are grateful for their comments that help us better understand both what is happening right now with bank mergers and where we need to strengthen the bank merger guidelines. So with that this hearing is adjourned.

[Whereupon, at 3:43 p.m., the hearing was adjourned.]

[Prepared statements and additional material supplied for the record follow:]

PREPARED STATEMENT OF CHAIR ELIZABETH WARREN

Good afternoon. I'm pleased to be chairing today's Economic Policy Subcommittee hearing on the economic impacts of bank consolidation. I appreciate our witnesses joining us, and Senator Kennedy's partnership in putting this hearing together.

After the 2008 financial crisis and the subsequent bank bailout, Congress passed the Dodd-Frank Act. The law was designed to ensure that giant banks could never again threaten our economy. But with the collapse of Silicon Valley Bank, Signature Bank, and First Republic Bank—three of the largest bank failures in our Nation's history—two things have become obvious.

First, bank failures remain a serious threat to our economy, putting taxpayers at risk of footing multibillion-dollar bailouts if they go under. And second: regulators are courting disaster by continuing to encourage giant banks to grow even bigger. Treating mergers as a solution to financial instability increases that instability.

The problem with megabanks goes well beyond the increased risk of blowing up the financial system. As big banks get even bigger, branch closures increase. This reduces the availability of bank services, and increases the cost of credit for small businesses and families.

This problem can be life or death for small businesses that can't find anyone at a big bank who understands the local economy or the actual business that needs credit. The problem is also worse in lower-income neighborhoods, where research shows predatory lenders and check-cashers proliferate as bank consolidation rises.

When banks merge, consolidation has ripple effects that cost jobs, lower household incomes, and slow economic growth in local economies. Bank consolidation may boost CEO pay and investor profits, but it hurts everybody else's quality of life.

This problem seems obvious—and should be easy to fix. Congress spotted the problem long ago, and in 1960 passed the Bank Merger Act to give bank regulators, in consultation with the Department of Justice, the authority to block mergers that reduce competition, harm communities, or are not in the public interest.

Yet somehow, astonishingly, between 2006 and 2021, the Federal Reserve approved more than 3,500 consecutive mergers without denying a single one—a streak that would make Cal Ripken and Lou Gehrig green with envy.

The net result of regulators falling asleep at the switch is that since 1990, the number of banks in the U.S. has declined from over 18,000 to less than 5,000.

Meanwhile, the biggest banks have gotten bigger. In the mid-1990s, the 20 biggest banks in the country held 15 percent of all bank assets. Today, the top 20 hold more than 65 percent of all bank assets. And the concentration at the very top is even more extreme. The biggest four banks alone hold more assets than the next 75 banks combined.

President Biden, to his credit, recognized this problem and is working to try to fix it. In his July 2021 Executive order on competition, he concluded that bank consolidation [quote] “raises costs for consumers, restricts credit for small businesses, and harms low-income communities,” and ordered banking regulators to update outdated and failed bank merger review policies.

Two years later, we are finally on the cusp of seeing what those new merger guidelines are going to look like. Last month, Jonathan Kanter, the Justice Department's top antitrust enforcer, indicated that new guidelines would be coming soon—and that the Department would be giving much tougher scrutiny to mergers.

That's good news. I hope these guidelines are out soon, and you better believe I want them to be tougher than the current rules.

But I'm extraordinarily concerned about what we've seen in recent months from banking regulators. When First Republic Bank collapsed in April, the bank was ultimately sold to the biggest bank in America, JP Morgan Chase. That sweetheart deal cost the Federal Deposit Insurance Fund \$13 billion.

Meanwhile, overnight, the country's biggest bank got \$200 billion bigger. And what happened to the regulators? The Acting Comptroller of the Currency, Michael Hsu, rubber stamped the deal in record time. When I asked Mr. Hsu at a hearing in May to explain how this merger was approved, he was unable to provide a clear answer.

But the overall picture gets worse. Instead of inattentive regulators who don't use their tools to block increasing consolidation, leaders within the Biden administration seem to be inviting more mergers.

- In a May 2023 statement before the House Financial Services Committee, Acting Comptroller Hsu reassured banks that the agency would be [quote] “open-minded” while considering merger proposals. And then earlier this week, he said, quote, “simply prohibiting all mergers of large banks really locks in the concentration amongst the existing megabanks, and I don't think that's the right answer,” end quote.

- Treasury Secretary Yellen recently warned that the banking “turmoil” from the collapse of Silicon Valley Bank, Signature Bank, and First Republic might lead to more mergers and that regulators would be—quote—“open to” them. Then the *New York Times* also reported that Secretary Yellen privately told big banks that she would, and I quote, “welcome more mergers.”

These comments are stunningly wrongheaded. They indicate that key banking regulators have learned exactly the wrong lessons from the bank failures earlier this year and the 2008 financial crash before it. Too-big-to-fail banks pose risks to stability of the financial system and increasing banking concentration puts a damper on small business growth across the country.

We need effective regulation and bank supervision that prevent big banks from failing in the first place. We also need to police bank mergers to ensure that big banks have robust competition to ensure they are serving consumers and small businesses.

I appreciate our witnesses being here to discuss how we can do that.

PREPARED STATEMENT OF MORGAN HARPER
DIRECTOR OF POLICY AND ADVOCACY, AMERICAN ECONOMIC LIBERTIES PROJECT
JULY 12, 2023

Written Testimony
Of
Morgan Harper
Director of Policy and Advocacy
American Economic Liberties Project

Before the Subcommittee on Economic Policy
U.S. Senate Committee on Banking, Housing, and Urban Affairs

July 12, 2023

Chair Warren, Ranking Member Kennedy, Members of the Subcommittee, thank you for the opportunity to give this testimony.

I am the Director of Policy and Advocacy at the American Economic Liberties Project, a policy and advocacy organization dedicated to addressing the problem of concentrated economic power—monopolies. The harms of systemic monopolization in America are vast: higher consumer prices, fewer small businesses, depressed levels of entrepreneurship and business dynamism, more fragile supply chains and shortages, markedly lower wages for workers (particularly lower-income workers), regional inequality, worse outcomes for patients as a result of hospital mergers and private equity roll-ups, reduced military preparedness resulting from extreme concentration in the defense industry, the destruction of a sustainable revenue model for local news because of Google and Facebook's monopolization of digital advertising, and I could go on. The point is that monopoly power is one of the main impediments to broad-based social, economic, and racial justice in America.

My journey to Economic Liberties and the anti-monopoly movement, which seeks to revive enforcement of our nation's antitrust laws and increase competition across the economy, has much to do with two professional experiences in the years following the 2008 global financial crisis. The first was working as a corporate attorney at a global law firm, where I witnessed how quickly big banks, including those that had been deemed "too big to fail" after causing the mortgage crisis, had rebounded and were generating incredible gains through record deal flow. Their insulation from the consequences of irresponsible risk-taking was striking, and it suggested that something about our policy responses had been horribly misguided.

The second was working as a regulatory attorney and Senior Advisor at the Consumer Financial Protection Bureau, taking on the payday lending industry, debt collectors, and banks that cheated consumers and imposed ridiculous fees like overdraft charges that nickel and dimed Americans at one of the country's most vulnerable moments. At the CFPB, we used our legal authorities aggressively to hold those who broke the law accountable and ensure consumers knew their rights in the financial marketplace.

But the reality was that we were swimming upstream. The structural advantages of large financial institutions put in place in the 1990s, and turbo-charged after the financial crisis, ensured that they knew they could lie to their regulators, consider fines rounding errors, and expect that consumers, small businesses, and entrepreneurs would take it because there was nowhere else to go.

These experiences made clear to me that concentrated economic power was the most pressing problem of our times, and in the years since I've helped lead a growing movement to revive our nation's antitrust laws and address the threats to our economy and democracy from concentrated corporate power.

Consolidation in the banking sector is one area requiring special attention. In 1990, there were 15,000 banks in America.¹ Today, there are hardly more than 4,000.² The six largest banks – JP Morgan Chase, Bank of America, Citigroup, Wells Fargo, Goldman Sachs, and Morgan Stanley – control more assets (\$13.6 trillion) than all others combined.³ The largest four “trillionaire” banks, which controlled under 10% of the nation's deposits in 1995, accounted for 36% in 2020.⁴ Meanwhile, the share of assets held by smaller banks with total assets under \$1 billion has dropped from 25% in 1994 to just 6% in 2019, likely even smaller now.⁵ Today, more than three-quarters of the United States' local banking markets are considered uncompetitive, even more pronounced in rural areas, where nearly 90 percent of local markets are considered highly concentrated.⁶

Most of this consolidation has not occurred organically, but rather, results from persistent merger and acquisition strategies with disastrous consequences for the business community and consumers, and the stability of our financial system overall as more and more power and capital concentrates in fewer and fewer hands at the top of the financial food chain, allowing a handful of powerful financial firms to exercise outsized control over our economy and democracy. This year has seen a string of bank failures – Silvergate Bank, Signature Bank, Silicon Valley Bank, and First Republic Bank – which have required federal intervention and heightened concerns about the stability of the banking industry. Many of these same banks had undergone recent mergers or raced towards rapid growth after the rollback of critical financial regulations.

Despite the litany of evidence of the harms of bank consolidation and recent bank failures spotlighting financial stability risks of a consolidated banking industry, some of our top economic officials continue to argue that more consolidation is needed, cheerleading *more* bank mergers.⁷ Economic Liberties recently led sixteen other public interest organizations in writing to Treasury Secretary Yellen and Acting Comptroller of the Currency Hsu to express our concerns about cavalier attitudes towards banking consolidation.

Yesterday, on the same day that Acting Comptroller Hsu publicly pushed for more bank mergers, *his own agency* found that too big to fail mega-bank Bank of America systematically and illegally double-dipped on fees slapped on customers with too little money in their accounts without

¹ Jeremy C. Kress, Reviving Bank Antitrust, 72 Duke Law Journal 519-598, Nov. 2022, <https://scholarship.law.duke.edu/dlj/vol72/iss3/1/>.

² “Annual Historical Bank Data,” FDIC, <https://banks.data.fdic.gov/bankfind-suite/historical>.

³ Large Holding Companies, Federal Reserve Data, 2022, <https://www.fiec.gov/npw/Institution/TopHoldings>.

⁴ Letter from Americans for Financial Reform Education Fund to Assistant Attorney General Makan Delrahim, Oct. 16, 2020, <https://ourfinancialsecurity.org/wp-content/uploads/2020/10/AFREF-Comment-on-DOJ-Bank-Merger-Guidelines-10-16-20.pdf>.

⁵ FDIC Community Banking Study, FDIC, Dec. 2020, <https://www.fdic.gov/resources/community-banking/report/2020/2020-cbi-study-full.pdf>.

⁶ Kress, Reviving Bank Antitrust.

⁷ Matt Egan, “Janet Yellen told bank CEOs more mergers may be necessary, sources say,” CNN, May 19, 2023, <https://www.cnn.com/2023/05/19/investing/janet-yellen-bank-mergers/index.html>.

customer knowledge or authorization.⁸ Bank of America was ordered to pay a quarter billion dollars in victim restitution and penalties.⁹

At its core, banking is not like other industries, and banks are not companies like any other – they play a unique role in the economy. The U.S. banking system functions through private firms that carry out a public function on behalf of the central bank and Treasury Departments. This monetary function is banks’ most important purpose – above credit intermediation and generation – meaning that banking is uniquely vested with the public interest.¹⁰ While the public allows banks a license to engage in vital commercial activity crucial, creating money and credit, banking law endeavors to prevent them from abusing this privilege. Accordingly, Congress long ago determined that bank consolidation deserved special scrutiny, passing the Bank Holding Company Act in 1956 and the Bank Merger Act in 1960, in addition to the nation’s antitrust laws prohibiting anticompetitive mergers.

To put it bluntly: in recent decades, bank regulators have failed to enforce antitrust laws and these statutes in the banking sector, to the detriment of small businesses, consumers, entrepreneurs and the stability of our economy overall. That’s why I’m grateful to the Senators for organizing this hearing, which can hopefully serve as an accelerant to learn from past mistakes in policymaking as the Justice Department and banking regulators reconsider merger policy in this critically important market.

I. The Cost of Bank Mergers and Consolidation

Contrary to industry boosters who suggest that consolidation has resulted in greater efficiencies, bank consolidation has wrought devastating consequences for communities and small businesses across the country.

For example, in Ohio, where I live, the \$22 billion mega-merger between Columbus-based Huntington Bank and Michigan’s TCF in 2021 led to more than 250 branch closures.¹¹ When Huntington acquired Ohio-rival First Merit in 2016, they shuttered over 100 branches in the state.

Historically, a key factor driving dynamism in the American economy is the large number of small banks, including their physical branches, serving communities-consumers and small businesses-

⁸ Michelle Chapman, “BoFA hit with \$250 million in fines, penalties, refunds for ‘double-dipping’ fees, fake accounts,” AP, Jul 11, 2023 <https://apnews.com/article/bank-america-fees-customer-account-56fa8400ab01a15ec75a372561a3d851>

⁹ Sam Sutton, “Hsu makes a (limited) case for large bank mergers,” Politico Morning Money, Jul 11, 2023, <https://www.politico.com/newsletters/morning-money/2023/07/11/hsu-makes-a-limited-case-for-large-bank-mergers-00105524>

¹⁰ Robert C. Hockett and Saule T. Omarova, *The Finance Franchise*, 102 Cornell Law Review 5, July 2017, <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=4731&context=clr>

¹¹ Robert Channick, “Fifth Third to close 44 Chicago-area branches in July after completing MB bank merger,” Chicago Tribune, June 17, 2019, <https://www.chicagotribune.com/business/ct-biz-fifth-third-mb-close-branches-20190617-story.html>; Tristan Navera, “Here’s where the next wave of Huntington branch closings will take place,” Columbus Business First, April 22, 2021, <https://www.bizjournals.com/columbus/news/2021/04/22/huntington-bank-closing-44-branches-in-meijer-stor.html>; Letter from Senator Sherrod Brown to Acting Comptroller of the Currency Michael Hsu, March 2, 2023, https://www.banking.senate.gov/imo/media/doc/ccc_letter.pdf

across the nation. This is still true today: smaller banks provide banking access to local communities, offering community-connected, face-to-face consumer banking services, and more accessible and affordable financial products with fewer fees. Just ask Federal Reserve Chair Jerome Powell, who in testimony before House Financial Services last month revealed that after his family's most recent mortgage was denied by a huge bank they turned to a local community bank – which, knowing both his family and the house itself, gave the family a mortgage within days. This is a common story across America.

Small local banks, in addition to providing banking access to rural communities that larger banks avoid, also play a particularly outsized role in commercial lending to small and newly formed businesses, including during times of economic stress when access to credit dries up.¹² Small businesses and entrepreneurs rely on smaller local banks to access the credit and financing they need to grow. This is partly because larger banks prioritize larger businesses, simply because it is easier to award and manage fewer, larger loans.¹³

Big banks' prioritization of larger businesses showed during COVID, when the federal Paycheck Protection Program (PPP) offered forgivable loans through banks to American firms at the height of the COVID pandemic. This program laid bare the consequences of consolidation, with areas with the most big banks less likely to receive PPP funding.¹⁴ Tellingly, the four largest U.S. banks originated just 3 percent of PPP loans, even though they originated 36% of small business loans before the program.¹⁵ In contrast, though community banks account for just 15 percent of bank industry assets and 12 percent of loans, they issued 31 percent of all PPP loans made by banks.¹⁶

These benefits to small businesses from smaller community and regional banks are lost through mergers. For small businesses that can still access credit after a bank merger, the cost of credit increases, with more difficult terms and lower loan sizes.¹⁷ One study suggested that post-merger branch closures lead to a 22% decrease in banks' small business lending.¹⁸ Banking consolidation has degraded access to capital, creating capital deserts for many aspiring entrepreneurs – 80% of whom struggle to obtain any funding at all.¹⁹ After bank mergers, new business formation drops,

¹² Matt Hanauer et al., "Community Banks' Ongoing Role in the U.S. Economy," Federal Reserve Bank of Kansas City, Economic Review 106 No. 2, Jun. 24, 2021, <https://www.kansascityfed.org/documents/8159/EconomicReviewV106N2HanauerLytleSummersZiaadeh.pdf><https://www.kansascityfed.org/Economic%20Review/documents/8159/EconomicReviewV106N2HanauerLytleSummersZiaadeh.pdf>.

¹³ FDIC Community Banking Study, 2020, <https://www.fdic.gov/resources/community-banking/report/2020/2020-cbi-study-full.pdf>.

¹⁴ Haoyang Liu and Desi Volker, "Where Have the Paycheck Protection Loans Gone So Far?," Federal Reserve Bank of New York, May 6, 2020, <https://libertystreeteconomics.newyorkfed.org/2020/05/where-have-the-paycheck-protection-loans-gone-so-far.html>.

¹⁵ João Granja et al., "Did the Paycheck Protection Program Hit the Target?," Becker Friedman Institute Working Paper 2020-52, available at https://bfi.uchicago.edu/wp-content/uploads/BFI_WP_202052-1.pdf.

¹⁶ Margaret Hanrahan & Angela Hinton, The Importance of Community Banks in Paycheck Protection Program Lending, 14 FDIC Q., no. 4, 2020, at 31.

¹⁷ Mark J. Garmaise and Tobias J. Moskowitz, "Bank Mergers and Crime: The Real and Social Effects of Credit Market Competition," NBER, Dec. 2004, <https://www.nber.org/papers/w11006>.

¹⁸ Yichen Xu, "The Importance of Brick-And-Mortar Bank Offices: Evidence From Small Business And Home Mortgage Lending, 1998-2016," University of Delaware, 2018, <https://udspace.udel.edu/server/api/core/bitstreams/99172649-6544-495c-a4b7-7bf028c15038/content>.

¹⁹ Elizabeth MacBride and Seth Levine, The New Builders: Face to Face With the True Future of Business, Wiley, May 4, 2021.

with documented links to declines in commercial real estate development, construction activity, and local property prices, and rises in unemployment and income inequality.²⁰

A consolidated financial sector cuts back drastically on consumer services as well. Mergers eliminate important services associated with in-person, brick-and-mortar branches – like extended business hours, ATMs, safety deposit boxes, and customer service benefits²¹ – with physical proximity to a bank branch also playing a significant role in, for example, whether Americans can obtain a mortgage.²² When BB&T and SunTrust merged in 2019 to become Truist, the merged bank closed over 820 branches across the country, nearly a third of its locations.²³ M&T Bank, as part of its 2022 \$7.6 billion purchase of Connecticut-based People's United, announced plans to reduce its footprint in New York and Connecticut by more than 40 locations.²⁴ U.S. Bank, after winning approval for its \$8 billion takeover of Union Bank in December 2022, announced 145 branch closures in California alone.²⁵ With the merger-induced loss of bank branches, access to banking tightens, credit dries up, and too many Americans are pushed out of the financial system.

This particularly affects low-income and minority communities. In fact, 25% of all rural bank closures are in majority-minority census tracts.²⁶ Elderly, low-income, disabled, and non-college-educated Americans more heavily rely on brick-and-mortar bank branches for financial services.²⁷ Branch closures can push consumers out of the banking system entirely, driving them into the arms of predatory non-bank financial companies like payday lenders and check cashers that pop up in place of banks after merger-induced branch closures, leading to more debt collections and evictions.²⁸

²⁰ Bill Francis et al., "Bank Consolidation and New Business Formation," *Journal of Banking and Finance* 32 8, 2008, <https://www.sciencedirect.com/science/article/abs/pii/S0378426607003718>; Garmaise and Moskowitz, "Bank Mergers and Crime."

²¹ Committee for Better Banks, "Mapping the Banking Divide: How Bank Branch Openings Close Financial Opportunities," Sept. 29, 2022, <https://storymaps.arcgis.com/stories/79517729f59c4db38dbc3e032e0d42e1>; Jaime Weisberg, "How Branch Closures Impact Hard Hit Communities," Association for Neighborhood & Housing Development, May 6, 2021, <https://anhd.org/blog/how-branch-closures-impact-hard-hit-communities>.

²² Sumit Agarwal and Robert Hauswald, "Distance and Private Information in Lending," *The Review of Financial Studies*, July 2010, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=996602.

²³ Richard Craver, "Truist surpasses goal of closing 800 branches. Workforce down 14% since bank debuted," *Winston-Salem Journal*, April 19, 2022, https://journalnow.com/business/local/truist-surpasses-goal-of-closing-800-branches-workforce-down-14-since-bank-debuted/article_73c96916-bf1d-11ec-b566-1f02b2039bbd.html.

²⁴ Denise Civiletti, "M&T Bank's acquisition of People's United to close in early April," *Riverhead Local*, March 17, 2022, <https://riverheadlocal.com/2022/03/17/mt-banks-acquisition-of-peoples-united-to-close-in-early-april>.

²⁵ John Lindt, "U.S. Bank acquires Union Bank. Here's what it means for customers in SLO County," *The San Luis Obispo Tribune*, March 8, 2023, <https://www.sanluisobispo.com/news/business/article272814670.html>.

²⁶ Jason Richardson et al., "Bank Branch Closures from 2008-2016: Unequal Impact in America's Heartland," National Community Reinvestment Coalition, May 2017, https://ncrc.org/wp-content/uploads/2017/05/NCRC_Branch_Deserts_Research_Memo_050517_2.pdf.

²⁷ National Survey of Unbanked and Underbanked Households, FDIC, 2021, <https://www.fdic.gov/analysis/household-survey/2021report.pdf>.

²⁸ Vitaly Bord, "Bank Consolidation and Financial Inclusion: The Adverse Effects of Bank Mergers on Depositors," Harvard Business School, Dec. 1, 2018, <https://scholar.harvard.edu/files/vbord/files/vbord-bank-consolidation-and-financial-inclusion-full.pdf>; Dimuthu Ratnadiwakara and Vijay Yerramilli, "Effect of Bank Mergers on the Price and Availability of Mortgage Credit," Sept. 2020.

Bank consolidation also raises consumer privacy concerns. Privacy, an “important dimension of quality,” impacts how consumers’ sensitive financial data is collected, aggregated, and often further monetized when banks sell that data to third parties. Mergers – which concentrate data in fewer number of financial institutions, leaving more Americans at increased risk of data breaches – enable banks to harvest and blend consumer, “making it easier for them to price discriminate and take advantage of customers’ biases.”²⁹

As merged banks take advantage of their increased market power, they reduce the services they provide while increasing prices for services and products that remain. Banks reduce interest rates for depositors³⁰ and hike the “junk fees” they levy on consumers for basic financial services – painful fees for things like account maintenance, ATM access, nonsufficient funds, overdrafts, and stop payments – lucrative practices for banks that cost Americans billions every year.³¹ These junk fees make it more expensive for low-income households to keep their bank accounts.³² Bank mergers are associated with higher rejection rates for mortgage applications³³ – particularly for federally backed mortgage loans insured by the Federal Housing Authority (FHA), on which lower income and minority borrowers are more reliant for homeownership.³⁴ Low-income and racial minority communities are also disproportionately targeted by banks’ junk fees relative to other customers, compounding racial wealth imbalances and exacerbating economic inequality.³⁵

With these branch closures also come job losses. The BB&T-SunTrust merger saw more than 8,000 jobs lost.³⁶ After a \$2.6 billion merger with Flagstar Bank, New York Community Bank in 2023 cut more than a thousand jobs,³⁷ while after its merger with People’s Bank, M&T Bank announced plans to cut 28% of its jobs in the state.³⁸ One study quantified these job losses, high-

²⁹ Kress, Reviving Bank Antitrust

³⁰ Valeriya Dinger, “Bank Mergers and Deposit Interest Rate Rigidity,” Federal Reserve Bank of Cleveland Working Paper No. 11-31, Dec. 4, 2011, <https://ssrn.com/abstract=1971315>.

³¹ Timothy H. Hannan, “Retail Deposit Fees and Multimarket Banking,” Finance and Economics Discussion Series Divisions of Research & Statistics and Monetary Affairs, Federal Reserve Board, 2005, <https://www.federalreserve.gov/pubs/feds/2005/200565/200565pap.pdf>; Charles Kahn et al., “Bank consolidation and the dynamics of consumer loan interest rates,” *Journal of Business*, 78 No. 1, 2005, <https://www.jstor.org/stable/10.1086/426521?seq=11>.

³² Bord, “Bank Consolidation.”

³³ Greg Buchak and Adam Jorring, “Do Mortgage Lenders Compete Locally? Implications for Credit Access,” Jan. 7, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3762250.

³⁴ Neil Bhutta and Aurel Hizmo, “Do Minorities Pay More for Mortgages?,” Board of Governors Federal Reserve Working Paper No. 2020-007, <https://academic.oup.com/rfs/article/34/2/763/5827007>.

³⁵ Id.; Erik J. Mayer, “Big Banks, Household Credit Access, and Intergenerational Economic Mobility,” Southern Methodist University Cox School of Business Research Paper no. 21-04, <https://ssrn.com/abstract=3816308>.

³⁶ Craver, “Truist”; Austin Weinstein, “Truist cuts 800 jobs. More cutbacks expected in BB&T, SunTrust merger,” *The Charlotte Observer*, April 20, 2020, <https://www.charlotteobserver.com/news/business/banking/article242131711.html>.

³⁷ Candice Williams, “Flagstar Bank trims retail mortgage, cuts jobs in wake of merger,” *The Detroit News*, Jan. 31, 2023, <https://www.detroitnews.com/story/business/2023/01/31/flagstar-bank-trims-retail-mortgage-cuts-jobs-in-wake-of-merger/69858748007/>.

³⁸ Kenneth R. Gosselin, “M&T Bank laid off more than 300 in its acquisition of People’s United. There’s more to come,” *Hartford Courant*, Oct. 3, 2022, <https://www.courant.com/2022/10/03/mt-bank-laid-off-more-than-300-in-acquisition-of-peoples-united-theres-more-to-come/>.

lighting that a 142-point increase in county-level HHI corresponds with a 0.5 percent drop in employment – jobs that remained took a 2 percent hit to average wages, with a more drastic fall in Black communities.³⁹

For large financial institutions, the perception among other market participants that they will receive government bailouts – the “too-big-to-fail subsidy,”⁴⁰ only further emphasized during the bank collapses of 2023 – allows big banks to borrow more cheaply than they would otherwise, given their risk profiles.⁴¹ This gives banks a financial incentive to grow even larger, disadvantaging smaller firms like community banks, degrading competition, and artificially encouraging further consolidation.⁴²

Bank mergers also pose a threat to competition in other industries outside of the financial sector. Bank consolidation, via increased risk of depository institutions failure, leading to bankruptcies of corporate clients – take SVB, for example, whose failure was described as “an extinction level event for startups” that “will set startups and innovation back by 10 years or more.”⁴³ Mergers also lead banks to prioritize credit to larger incumbent firms,⁴⁴ decreasing credit availability and increasing its cost to smaller companies and startups.⁴⁵ As the U.S. Supreme court put it simply in 1963: “concentration in banking accelerates concentration generally.”⁴⁶

When industry boosters propose further consolidation as a positive solution to bank failures, the truth is that this consolidation comes with grave short- and long-term consequences for everyday Americans.

II. Threats to Financial Stability

Relevant to the events of this past year in the industry, bank mergers and consolidation also increase systemic risk in the financial system. The concentration of assets at a handful of large financial institutions concentrates the risk of failure within fewer points in the banking system, magnifying risk and increasing fragility. This is borne out by the Federal Reserve’s own research,

³⁹ Robert Mann, “Bank Competition, Local Labor Markets, and the Racial Employment Gap,” Aug 8, 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4013042

⁴⁰ Gary H. Stern and Ron J. Feldman, “Too Big to Fail: The Hazards of Bank Bailouts,” The Brookings Institution, Dec. 2003, <https://www.jstor.org/stable/10.7864/j.ctt1gpc87>.

⁴¹ Independent Community Bankers of America, “Too-Big-To-Fail Subsidies Threaten Economy, Community Banks, and Taxpayers,” 2014, <https://www.icba.org/docs/default-source/icba/advocacy-documents/testimony/113th-congress/test073114.pdf?sfvrsn=2>.

⁴² Ofc. Of the Comptroller of the Currency, Bd. Of Governors of the Fed. Reserve Sys. & Fed. Deposit Ins. Corp., Regulatory Capital Rules: Regulatory Capital, Enhanced Supplementary Leverage Ratio Standards for Certain Bank Holding Companies and Their Subsidiary Insured Depository Institutions, 78 Fed. Reg. 51101, 51102-03 (Aug. 20, 2013), <https://www.govinfo.gov/content/pkg/FR-2013-08-20/pdf/FR-2013-08-20.pdf>.

⁴³ <https://www.wired.com/story/silicon-valley-bank-collapse>.

⁴⁴ Nicola Cetorelli and Philip E. Strahan, “Finance as a Barrier to Entry: Bank Competition and Industry Structure in Local U.S. Markets,” The Journal of Finance, Oct. 2004, <https://www.nber.org/papers/w10832>.

⁴⁵ Garmaise and Moskowitz, “Bank Mergers and Crime”; Jonathan A. Scott and William C. Dunkelberg, “Bank Mergers and Small Firm Financing,” Journal of Money, Credit and Banking, Dec. 2003, <https://www.jstor.org/stable/3649868>.

⁴⁶ United States v. Philadelphia National Bank, 374 U.S. 321, 370 (1963)

demonstrating that distress at of a single \$250 billion bank would be far worse for the economy than if five \$50 billion banks failed separately.⁴⁷

Bank consolidation imparts large financial institutions an implicit government bailout guarantee exemplified in the phrase “too-big-to-fail,” leading to banks that are far more willing to take dangerous risks.⁴⁸ Despite common claims that larger banks have more modern and sophisticated systems for risk management, there is little evidence to support that claim. In fact, some studies show the opposite, with the more complex business models of larger banks increasing systemic risks that they are operationally unable to monitor or manage.⁴⁹

Before 2008, federal banking agencies largely ignored financial stability concerns in bank merger review, viewing consolidation, as, if anything, a benefit to financial stability, due to increased profits. After the 2008 financial crisis, which demonstrated the consequences of consolidation with painful clarity, Congress acted to prioritize bank mergers’ financial stability risks, ordering the banking agencies to take into account “risk[s] to the stability of the United States banking or financial system” in merger review.⁵⁰ While a welcome change from the status quo, thus far the Federal Reserve’s application of this standard has been questionable. Former Federal Reserve Governor Daniel Tarullo has suggested Federal Reserve regulators pay little attention to these systemic risks in bank merger review, warning that the Fed lacks a “reasonably well-developed and well-explained approach” to financial stability analysis.⁵¹ This must change. Financial stability must be brought to the forefront of bank merger review.

This year, with the collapse of Silvergate, Signature, Silicon Valley, and First Republic Banks, it is clear that our regulators have deeply misjudged the risks of regional and midsized banks, which, though large, hardly approach the behemoth size of their Wall Street counterparts.

When approving SVB’s acquisition of Boston Private Bank in 2021, the Federal Reserve stated that the bank “would not be a critical services provider or so interconnected with other firms or

⁴⁷ Simone Varotto and Lei Zhao, “Systemic risk and bank size,” *Journal of International Money and Finance* 82, Apr 2018, <https://www.sciencedirect.com/science/article/abs/pii/S0261560617302425>; Gregor N.F. Weiß et al., “Systemic risk and bank consolidation: International evidence,” *Journal of Banking and Finance* 40, Mar 2014, <https://www.sciencedirect.com/science/article/abs/pii/S0378426613004536>; Amy G. Lorenc and Jeffery Y. Zhang, “The Differential Impact of Bank Size on Systemic Risk,” Divisions of Research & Statistics and Monetary Affairs, Federal Reserve Board, Washington, D.C., 2018, <https://www.federalreserve.gov/econres/feds/files/2018066nap.pdf>.
⁴⁸ JinAh Kim, “Effects of Bank Mergers on Risk Leading Up to the 2007-2008 Mortgage Crisis,” University of Pennsylvania Wharton School, 2016, <https://repository.upenn.edu/cgi/viewcontent.cgi?article=1008&context=spur>; Gaetano Chionsini et al., “Bank Mergers, Diversification And Risk,” Banca d’Italia, Banking and Financial Supervision, 2004, <https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=ee91b897f36031ddae87701899ec152e9bf47fd1>.

⁴⁹ Chernobai, A., Ozdagli, A., & Wang, J. (2021). Business complexity and risk management: Evidence from operational risk events in US bank holding companies. *Journal of Monetary Economics*, 117, 418-440, [https://www.sciencedirect.com/science/article/abs/pii/S0304393220300209#:~:text=In%20particular%2C%20the%20operational%20risk,failures%20\(BCBS%2C%202001\)](https://www.sciencedirect.com/science/article/abs/pii/S0304393220300209#:~:text=In%20particular%2C%20the%20operational%20risk,failures%20(BCBS%2C%202001))

⁵⁰ 12 U.S.C. § 1828(c)(5) (2018).

⁵¹ Daniel K. Tarullo, “Regulators should rethink the way they assess bank mergers,” The Brookings Institution, Mar 16, 2022, <https://www.brookings.edu/opinions/regulators-should-rethink-the-way-they-assess-bank-mergers/>.

markets that it would pose significant risk to the financial system in the event of financial distress.”⁵² This systemic misjudgment, which has helped facilitate far too much of today’s banking consolidation, must be rethought.

Financial consolidation leads to financial crises, which, in a vicious cycle, lead to even more consolidation. For example, the 2008 financial crisis, which has been identified as “a predictable consequence of excessive consolidation in the banking sector,” was both the result and cause of industry consolidation.⁵³ The crisis, a mass concentration event itself, was the product of a wave of bank consolidation sparked by deregulation that concentrated risk, assets, and economic power in the hands of a dwindling number of larger and larger firms, each in turn taking larger and larger risks. The resolution of the financial crisis, ironically, led to further consolidation as regulators turned to emergency mergers as short-term solutions that made the biggest banks even bigger, intensifying systemic risk, entrenching their market power, and undermining financial stability in the long term.⁵⁴

While proponents of consolidation may argue consolidation boosts stability, evidence suggests that increasing competition increases financial stability. Competition prods banks to take on more diversified risks, lessening fragility in the banking system,⁵⁵ and in local banking markets, reduces the likelihood of a financial crisis.⁵⁶ An investigation of bank competition before the 2008 financial crisis revealed that banks in competition-starved markets were more likely to engage in risky activity and more likely to fail.⁵⁷

Merging banks also increase financial stability risk by increasing banks’ penchant for risk-taking behavior, also referred to as moral hazard.⁵⁸ Like the phenomenon of “too big to fail” subsidies that distort industry competition, too big to fail size also incentivizes riskier behavior as banks may operate with an implicit government bailout guarantee.⁵⁹

Currently, financial stability concerns about further consolidation unfortunately continue to be ignored. This must change. Earlier this year, the collapse of First Republic Bank led to its purchase by JP Morgan, the nation’s largest bank, in turn inflating JP Morgan’s size by \$200 billion. While

⁵² Order Approving the Merger of Bank Holding Companies, the Merger of Banks, and the Establishment of Branches, Federal Reserve FRB Order No. 2021-08, Jun 10, 2021, <https://www.federalreserve.gov/newsevents/pressreleases/files/orders20210610a1.pdf>

⁵³ Kress, Reviving Bank Antitrust

⁵⁴ Prepared Remarks of CFPB Director Rohit Chopra at the 2023 American Economic Liberties Project Anti-Monopoly Summit, Washington, D.C., May 4, 2023, <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-rohit-chopra-2023-american-economic-liberties-project-anti-monopoly-summit/>.

⁵⁵ Deniz Anginer et al., “How Does Competition Affect Bank Systemic Risk?” 23 *Journal of Financial Intermediation*, 2014, <https://www.sciencedirect.com/science/article/abs/pii/S1042957313000600>

⁵⁶ Klaus Schaeck, Martin Cihak & Simon Wolfe, Are Competitive Banking Systems More Stable?, 41 *J. MONEY, CREDIT & BANKING* 711, 713 (2009).

⁵⁷ Brian Akins, Lynn Li, Jeffrey Ng & Tjomme O. Rusticus, Bank Competition and Financial Stability: Evidence from the Financial Crisis, 51 *J. FIN. & QUANTITATIVE ANALYSIS* 1, 1 (2016).

⁵⁸ JinAh Kim, “Effects of Bank Mergers on Risk Leading Up to the 2007-2008 Mortgage Crisis,” University of Pennsylvania Wharton School, 2016, <https://repository.upenn.edu/cgi/viewcontent.cgi?article=1008&context=spur>.

⁵⁹ Gaetano Chionsini et al., “Bank Mergers, Diversification And Risk,” Banca d’Italia, Banking and Financial Supervision, 2004, <https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=ee91b897f36031ddae87701899ec152e9bf47fd1>.

the transaction received regulatory approval from the FDIC – required by law to accept the highest bid and lowest cost to the Deposit Insurance Fund – it also was approved by the OCC, which is legally obligated to consider whether the merger poses a risk to the stability of the financial system.⁶⁰ The OCC stated that “[t]he Transaction does not increase risk to the stability of the United States banking or financial system as it facilitates the orderly resolution of an insured depository institution in default.”⁶¹ Several aspects of this analysis are deeply troubling:

- By the G-SIB score metric, which estimates the impact to our financial system of large bank failures, the First Republic acquisition represented between an 800 percent and 1400 percent increase in risk to the banking system over other reported bids.⁶² It is troubling that the OCC chose to approve this deal and make the country’s biggest bank even bigger.
- The OCC made no mention of a determination of the managerial risks and community impacts of JP Morgan’s compliance record.⁶³ JP Morgan has paid more than a billion dollars in fines just since 2020 for violating the law, including for market manipulation, mis-managing Americans’ mortgage escrow balances, and failing to properly protect its customers from identity theft.⁶⁴
- JP Morgan already exceeded the Riegle-Neal national deposit cap by owning more than 10% of the nation’s bank deposits. But for a loophole allowing banks in violation of the cap to purchase failing banks, federal law would prohibit JP Morgan from consummating any bank merger in every other circumstance.⁶⁵

Ultimately, federal bank regulators must properly place financial stability concerns at the forefront of bank merger review and cease the facilitation of further bank consolidation, or risk disaster.

III. Failures of Financial Regulation and Bank Merger Policy

Today’s banking consolidation has been enabled by decades of systemic regulatory rollback. The 1994 Riegle-Neal Act allowed interstate bank mergers, previously prohibited, sparking a wave of mergers. The 1999 Gramm-Leach-Bliley Act repealed critical parts of Great Depression-era financial regulations known as Glass-Steagall, separating commercial banks from investment banks and insurance companies, sparking another wave of mergers and inflaming risks of conflicts of interest

⁶⁰ 12 USC 1828(c)(5)

⁶¹ Letter from Stephen A. Lybarger, OCC Deputy Comptroller for Licensing, to John H. Tribolati, Secretary, JPMorgan Chase Bank, May 1, 2023, <https://www.occ.gov/topics/charters-and-licensing/app-by-jp-morgan-chase-bank.pdf>.

⁶² Anna Hrushka, “Warren blasts First Republic’s ‘troubling’ sale to JPMorgan,” *Banking Dive*, May 19, 2023.

⁶³ Letter from Stephen A. Lybarger, OCC Deputy Comptroller for Licensing, to John H. Tribolati, Secretary, JPMorgan Chase Bank, May 1, 2023, <https://www.occ.gov/topics/charters-and-licensing/app-by-jp-morgan-chase-bank.pdf>.

⁶⁴ Abhishek Manikandan, Michelle Price, “JPMorgan to pay \$920 million for manipulating precious metals, treasury market,” *Reuters*, Sep 29, 2020, <https://www.reuters.com/article/jp-morgan-spoofing-penalty/jpmorgan-to-pay-920-million-for-manipulating-precious-metals-treasury-market-idUSKBN26K325>; Brian Flood, “JPMorgan Chase Settles Mortgage Escrow Interest Class Action,” *Bloomberg Law*, May 26, 2021, <https://news.bloomberglaw.com/class-action/jpmorgan-chase-settles-mortgage-escrow-interest-class-action>; Matt Robinson, “JPMorgan, UBS Brokerage Units Pay SEC Fines for Anti-Identity Theft Programs,” *Bloomberg*, Jul 27, 2022, <https://www.bloomberg.com/news/articles/2022-07-27/jpmorgan-ubs-pay-sec-fines-over-anti-identity-theft-programs>.

⁶⁵ Polo Rocha et al., “JPMorgan Chase, FDIC put an end to First Republic’s slow bleed,” *American Banker*, May 1, 2023, <https://www.americanbanker.com/news/with-first-republic-on-the-brink-all-eyes-are-on-uninsured-deposits>.

in finance. Even the Dodd-Frank Act, passed in the wake of the 2008 financial crisis, was partly rolled back in a 2018 bank deregulation bill – again sparking a wave of mergers. In the case of 2018 Dodd-Frank rollback, eight of the ten largest bank mergers of the past decade were announced following 2019, igniting a rush of consolidation that helped lead to the bank collapses of 2023. The collapses of 2023, like other financial crises, in turn further concentrated the industry: SVB's death vaulted purchaser First Citizens to the sixteenth-largest U.S. bank,⁶⁶ and New York Community Bank, among the top 40 in asset size, scooped up Signature Bank's assets in "the deal of a lifetime."⁶⁷ The sale of First Republic to JPMorgan, already the nation's biggest bank, allowed JPMorgan to flout the nationwide 10% deposit cap and add \$200 billion in assets, the firm's "best deal in decades."⁶⁸

Despite a track record of failure in recent decades that could lead one to assume that either the United States has no bank antitrust laws or no agencies tasked with enforcing them, American financial regulators are statutorily bound to control consolidation in the banking system and mitigate the associated risks and harms. To address consolidation in banking, Congress enacted the Bank Holding Company Act in 1956 and the Bank Merger Act in 1960, together known as the bank merger statutes. Under these statutes, authority over bank mergers review is shared between the Federal Reserve, the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), and the Justice Department. Together, none of these agencies has blocked a bank merger in 20 years.⁶⁹

The bank merger statutes also provide banking agencies with an analytic framework to use in evaluating proposed mergers. This framework is far stricter than is the case for our other merger laws under the Clayton Act, which also applies to banks. Let me be clear: despite the lax attitude that regulators and financiers have had towards bank mergers and consolidation, the laws of this land clearly hold consolidation of the financial sectors to a far stricter and higher standard than consolidation elsewhere.

The Bank Merger Act requires the agencies to consider several factors:

- The merger's effect on competition;
- Risks to financial stability stemming from the merger;
- The merger's impact on the public interest;
- The condition of the bank's finances and management, as well as its future prospects; and
- The merging banks' record combating money laundering.⁷⁰

⁶⁶ Antoine Gara and Stephen Gandel, "How family-controlled First Citizens became a top-20 US bank," Financial Times, March 28, 2023, <https://www.ft.com/content/b883e5f6-811e-4fbc-a522-98f7ed098270>.

⁶⁷ Daniel Jones, "The Deal Of A Lifetime: New York Community Bancorp's Big Win At The Death Of Signature Bank," Seeking Alpha, March 21, 2023, <https://seekingalpha.com/article/4588955-new-york-community-bancorp-big-win-signature-bank-bargain-lifetime>.

⁶⁸ Breanna Bradham, "Bove Says First Republic May Be JPMorgan's Best Deal in Decades," Bloomberg, May 1, 2023, <https://www.bloomberg.com/news/articles/2023-05-01/odeon-s-dick-bove-says-first-republic-may-be-jpmorgan-s-best-deal-in-decades>.

⁶⁹ The last bank merger denied was Illini Corporation's attempted acquisition of Illinois Community Bank, in 2003. See Illini Corp., 89 Fed. Res. Bull. 85 (2003), <https://www.federalreserve.gov/boarddocs/press/orders/2002/20021223/attachment.pdf>.

⁷⁰ 12 U.S. Code § 1828.

The Bank Merger Act set forth a clear anti-monopoly mandate, requiring agencies to “take into consideration the effect of the transaction on competition (including any tendency towards monopoly).”⁷¹

Enforcing these laws consistently is a critical prophylactic measure necessary for regulators to adhere to, in particular given that in times of crisis more immediate concerns of financial stability often come to the fore. But even amid this year’s banking tumult, consolidation should not be viewed as either a safe or positive resolution strategy, particularly given that regulators themselves have had a poor record of risk evaluation during the regular course of bank M&A.

The Dodd-Frank Act requires large banks to have resolution plans, also known as “living wills,” which outline a bank’s strategy for how it can safely fail without a government bailout. The largest and most systemically important U.S. banks have since 2008 frequently submitted resolution plans rejected or found lacking by the FDIC and Federal Reserve.⁷² After the failures of SVB, Signature, and First Republic, FDIC board member and Consumer Financial Protection Bureau (CFPB) Director Rohit Chopra concluded, “I don’t think anyone truly believes the current plans filed by Wall Street firms are anything more than a fairy tale.”⁷³ We agree.

President Joe Biden’s 2021 Executive Order on Competition marshalled a whole-of-government approach to reinvigorating competition in the American economy, tasked bank regulators with strengthening bank merger oversight to guard against excessive market power.⁷⁴ While both the FDIC and Department of Justice responded by requesting public comment on revamping their bank merger policies, the Federal Reserve and OCC have thus far said little about how they plan to meet this responsibility.

Furthermore, the Department of Justice has signaled that it will ramp up its involvement in bank merger review and look to block bank mergers that it sees as violating the law.⁷⁵ In a recent speech, Assistant Attorney General for Antitrust Jonathan Kanter highlighted the DOJ’s new approach, pointing to the DOJ’s authority to directly challenge even bank mergers federal banking agencies have approved. Kanter also lamented the outdatedness of the 1995 DOJ bank merger guidelines and inappropriateness of applying them to today’s banking industry, ultimately indicating a new framework was imminent.

⁷¹ Bank Merger Act, Pub. L. No. 86-463, 74 Stat. 129.

⁷² Ryan Tracy, “Regulators Set to Reject Some Big Banks’ ‘Living Wills,’” *The Wall Street Journal*, April 12, 2016, <https://www.wsj.com/articles/regulators-set-to-find-flaws-in-big-u-s-banks-living-wills-1460491197>.

⁷³ Prepared Remarks of CFPB Director Rohit Chopra at the 2023 American Economic Liberties Project Anti-Monopoly Summit, Washington, D.C., May 4, 2023, <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-rohit-chopra-2023-american-economic-liberties-project-anti-monopoly-summit/>.

⁷⁴ Fact Sheet: Executive Order on Promoting Competition in the American Economy, White House, July 9, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>.

⁷⁵ Jonathan Kanter, “Promoting Competition in Banking,” Prepared Remarks at the Brookings Institution’s Center on Regulation and Markets, June 20, 2023, <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-address-brookings-institution>.

But legislative action is also important. In particular, last session Senator Warren and Representative Chuy García introduced the Bank Merger Review Modernization Act.⁷⁶ The Act would require bank mergers to be in the public interest, giving the CFPB oversight of mergers between consumer-facing banks, requiring that merger review discussions are made public, clear risk metrics to assess the systemic risks of bank mergers, banking regulators to make clear assessments of individual anticompetitive risks, and that only banks with strong risk management records be allowed to merge. These changes, in addition to existing statutory authority, will help fend off harmful consolidation in the banking industry.

III. Conclusion

Recent signs indicate conflicting visions of what competition in banking should be. One vision holds that banks need to get bigger – that they should swallow competitors and swell in size in a gruesome battle to become the last bank standing. When regulators like Secretary Yellen and Acting Comptroller Hsu propose facilitating this outcome they demonstrate clearly not only that they have learned nothing about policy from the 2008 financial crisis and the slow years of recovery, but that they are blind to the vast economic devastation and widespread human misery it engendered. To desire such an economy is to desire an economy that lurches from crisis to crisis, led by too big to fail banking firms abusing and cheating captive customers who have nowhere else to turn. This vision is untenable: we tried it, and it failed, crippling the economy in the process. To do so again would be insanity.

A different vision holds that we must preserve and protect the decentralized U.S. banking system, which has facilitated the world's strongest economy. That we must prioritize competition that leads to better products, better prices, and a more stable and sustainable economy – one that embraces the American tradition of a diverse array of banks serving their communities, allowing small businesses to flourish, incentivized to treat consumers with care and respect. One that battles not for size in a winner-take-all fight but to provide better banking to every American in every community in the country.

Our banking system should be built around a commitment to an equitable and fair economic system. These were the principles that precipitated the passage of, and are reflected in, the Bank Merger laws. These principles should not change, nor has there been any reason to change them. America thrives with a robust and competitive banking sector, and Congress and this subcommittee has an opportunity to ensure that the American government lives up to that mandate.

2008 taught us valuable lessons at a cost too painful to ignore. The record, littered with crime, fines, and irreparable consumer abuse, does *not* show that too big to fail banks are better at lending and facilitating commerce than their smaller counterparts. If anything, it shows that they prioritize breaking the rules to enrich themselves and ripping off their customers above improving service and access. If you believe Yellen and Hsu, *that* is what smaller banks should compete to become. We disagree.

⁷⁶ Press Release, “Senator Warren and Rep. Chuy García Introduce the Bank Merger Review Modernization Act to End Rubber Stamping of Bank Merger Applications,” Office of Senator Elizabeth Warren, September 30, 2021, <https://www.warren.senate.gov/newsroom/press-releases/senator-warren-and-rep-chuy-garcia-introduce-the-bank-merger-review-modernization-act-to-end-rubber-stamping-of-bank-merger-applications>.

Thank you again for inviting me to be a part of today's hearing. I look forward to your questions.

PREPARED STATEMENT OF MICHAEL FAULKENDER

DEAN'S PROFESSOR OF FINANCE AND CHIEF ECONOMIST, UNIVERSITY OF MARYLAND
AND AMERICA FIRST POLICY INSTITUTE

JULY 12, 2023

Chairwoman Warren, Ranking Member Kennedy, and Senators on the Subcommittee, thank you for the opportunity to speak with you today on the importance of a safe, sound, resilient, and growth-facilitating financial system for our Nation. I have been a finance professor since 2002, having published extensively on the capital raising activities of firms and previously was an Associate Editor at the *Journal of Finance* and the *Journal of Financial Services Research*. In addition, I had the privilege of serving as the Assistant Secretary for Economic Policy at the U.S. Department of the Treasury during the previous Administration. In that role, I worked closely with the Small Business Administration to quickly implement the Paycheck Protection Program and ensure that the economic devastation that might have resulted from the pandemic was not realized.

Part of my team's work at Treasury was to engage with a vast array of lenders across our Nation to ensure that eligible small businesses were able to obtain their PPP funds. I worked closely with community, regional, and large banks, CDFIs, MDIs, credit unions and FinTechs to better understand the issues they were confronting and to resolve the challenges they and their borrowers were facing. In December 2020, Treasury worked closely with Congress on legislative updates to PPP, extension of a second round of loans for the hardest hit small businesses, and enactment of additional capital funding for CDFIs and MDIs.

Historically, our Nation's economic strength has arisen from the ingenuity and dynamism of our private sector. Advancements in industries such as technology, pharmaceuticals, financial services, and entertainment disproportionately occur in the United States. This outcome is consistent with the academic literature that compares economic outcomes in different countries around the world and documents that "a business environment that promotes competition, private property rights, and sound contract enforcement boosts economic growth." A critical part of that business environment is access to capital. Unlike Europe where the history of the banking sector was largely to facilitate the borrowings of Governments, in the United States, we have historically had a decentralized banking system to meet the needs of businesses and consumers.

Significant economic growth originates from America's small businesses. According to data from the U.S. Chamber of Commerce and the U.S. Small Business Administration, small businesses account for 64 percent of new jobs in the United States and the comprise 46 percent of U.S. employment. In a Nation as ethnically diverse and geographically dispersed as ours, a robust private sector comprised of millions of small businesses is essential to meet the heterogeneous needs and desires of our Nation.

Indispensable to meeting the needs of U.S. small businesses has been the availability of credit from local and regional lenders. According to a recent Federal Reserve report, "large banks tend to be proportionately less committed than smaller banks to small business lending." Smaller banks with less than a billion dollars in assets on average had loan portfolios in June 2021 that were more than 13 percent comprised of small business loans. That figure was just 6 percent for the largest banks.

To understand why this disparity exists, it is helpful to employ a dichotomy used in the academic banking literature—the difference between hard and soft information. As my coauthor Mitchell Petersen defines it, hard information is knowledge that can be "easily reduced to numbers." On the other hand, soft information "requires a knowledge of its context to fully understand, and that becomes less useful when separated from the environment in which it was collected." Things like FICO scores, debt-to-income ratios, and collateral values are hard information that can just as easily be evaluated from across a desk as from across the country. The unique needs of a local demography and why a particular business model is viable in a particular geography is much more difficult to translate numerically and communicate in a large, hierarchical organization. That is why access to financing at the local level depends on a robust network of financial institutions with local roots, not just a handful of national megabanks.

The other factor at play has been the innovation of technology and telecommunications. The last 50 years have seen extraordinary advancements in computing power and the speed with which information moves at ever lower cost. Within financial services, we have witnessed the deployment of ATMs around the Nation. Online and mobile banking means that depositing checks and paying bills is faster and

more convenient than ever. Customers can now make deposits from anywhere in the country, access their money 24 hours a day, 7 days a week, easily transfer money between accounts, and pay bills from their computer or their phone. Lending underwriting models can now be programmed with borrower information verified entirely electronically and credit decisions issued nearly instantaneously. What we must understand about the economics of creating these ATM networks, online platforms, and lending systems is that they have large fixed-development costs and low variable costs, resulting in enormous returns to scale that make a partial shift toward larger banks something to be expected. The cost of creating the online platform is substantial for the first customer with almost zero incremental cost for the second.

Individual States and the U.S. Congress recognized the benefits of these technological and communication advances, green lighting the realization of such scale economies when it facilitated intrastate branching and later interstate banking. However, an important implication is that we now have greater concentration of banking activity than ever, with four megabanks serving nearly 48 percent of the Nation's deposits in 2022. According to the FDIC, in 1934, there were 14,146 commercial banks in the United States. That number stayed above 13,000 between 1934 and 1984 when the number of commercial banks in our Nation peaked at 14,496. Since 1984, that number has declined every single year down to 4,136 in 2022, a decline of more than 71 percent.

This enormous consolidation creates new challenges. Returning to the intersection of the information environment with advancements in technology, an equilibrium has emerged where hard information banking activities are being done primarily by large scale, multitrillion dollar banks who can easily incorporate numerical inputs into lending decisions. However, this model does not work for soft information loans. Some of the necessary information is lost as scale increases due to the difficulty of passing that information through a large organization.

Critical banking activities that rely on soft information are where community and regional banks are pivotal. Local knowledge requires local decision-making. Bankers in New York do not necessarily understand the local needs of Baton Rouge, LA, just as bankers in San Francisco may not know the lending opportunities in western Massachusetts. Local and regional bank executives and their boards constantly strive to find the balance between deploying the technological advances their customers require at an affordable cost while maintaining credit allocation decisions among those with the best information. We must ensure a vibrant ecosystem for providers of soft-information loans and not allow our concerns about systemic risks from large institutions to create extraordinary burdens for the primary capital providers to America's thriving small businesses.

This raises the third major factor banks must contend with—the evolving regulatory environment. Following the financial crisis, Congress enacted Dodd-Frank to impose greater requirements on the banking sector. In my view, this approach was misguided in numerous ways:

First, it presumes that financial regulators will be able to stay ahead of the banks they supervise. As the recent collapses of Silicon Valley Bank and First Republic Bank demonstrate though, if bank supervisors cannot identify and address simple interest rate risk and duration imbalances at the banks it oversees, how can we rely upon them to stave off more complicated risks from exotic derivatives or lending activities to new industries? This problem is compounded when banks have an incentive to complicate or obfuscate their operations.

Second, it causes the banking sector to be more uniform, as Tyler Goodspeed and I discussed in a recent *Wall Street Journal* opinion piece. One of the historical strengths of our financial system has been its vast number of participants and heterogeneity of business models. This means that when one bank fails, others are not identically weak. The overall system benefits from different banks pursuing different technologies, customer segments, and underwriting models. When regulators replace the judgment of the banks with their own, regulatory failures that over-emphasize credit risk and under-emphasize interest rate risk, for example, cause common shocks that put the entire system in greater jeopardy. For our largest institutions, I believe that the solution is greater capital, not greater bureaucracy. When investors have more of their own money at risk, they will force bank management to manage the risk they create better than any bank regulator.

Third, the systemic risk exception on deposit insurance has proven extraordinarily problematic. The Treasury Secretary's recent decision to declare uninsured deposits to be covered even though the banks clearly were not systemic means that depositors no longer have reason to discipline the banks at which they place their money. Imposing 5 percent haircuts on the deposits of large technology companies, private equity funds, foreign depositors, and wealthy individuals would have sent a message that chasing yield with uninsured deposits is risky and sometimes results in losses.

Instead, the outcome is that regional banks have seen significant deposit losses with some of those funds flowing to large banks, making them even larger. Statutory language implicitly saying that large banks have a more robust deposit guarantee than community and regional banks causes exactly the concentration of risk that policymakers should avoid. I agree that we need to take another look at deposit insurance and perhaps guarantee non-interest-bearing transaction accounts so that American workers can be sure that paychecks written on bank accounts with balances above the deposit limit are protected. Nowhere should law or policy provide differential deposit insurance based on the size of the bank.

Fourth, uniformly applying regulation and supervisory tactics to all banks when only the largest pose particular types of risk make small and regional banks less competitive. Large banks have the scale to implement large fixed-cost regulatory compliance obligations economically. This is why during the Trump administration, we raised the threshold for heightened supervision to \$250 billion in assets while allowing supervisors discretion to extend such requirements to banks as small as \$100 billion in assets. Such a bank without a chief risk officer for 8 months certainly should have received that heightened supervision. However, even if SVB had undergone the Fed's stress test, it would have passed because stress tests in 2022 focused on credit risk and ignored the 40-year high inflation caused by Congress' excessive spending. However, it is not just what statutes and regulations say that create problems. When bank supervisors request that small banks comply with more onerous requirements because they are "best practices", even though they are not mandated, compliance costs rise, and small banks are less economical.

Finally, bank regulation must make it easier for new banks to enter into existence. Since 2010, only 62 new FDIC-insured banks have been chartered in the United States, which is why we have seen the number of banks decline so dramatically in the last 40 years. Another of my former coauthors, Mark Flannery, served as Chief Economist at the Securities and Exchange Commission during the Obama administration. He pointed out a paradox in financial regulation that greater regulation may actually result in the average dollar being less regulated. The more that we make it difficult to comply with regulation, the more money goes into shadow banking. Passing on stricter mandates to our Nation's banks may instead result in marginal funds going to less regulated credit unions or unregulated FinTechs without necessarily making depositors or the system safer. This is why it is appropriate that we ask our regulators to work with industry and academics to identify the impediments to de novo banking so that greater bank entry might partially offset consolidation.

With regard to the bank merger review process, I think it is important that we give greater thought to the definition of local and regional competition. Lending activities of credit unions and FinTechs should be accounted for in determining the changes in market power that may be caused by a combination of banks. Regulated depository institutions and lenders who serve a locality online without a physical footprint are likewise competitors who should be acknowledged. Additionally, I agree with maintaining the current language in the law that requires the FDIC to accept the bid that is least costly to the insurance fund when resolving a failed bank. That said, we should make sure that the prospect of FDIC loss sharing guarantees do not delay mergers of poor performing banks to the detriment of the insurance fund.

Our banking system must continue innovating the provision of financial services to improve access, lower costs, and safeguard financial information. This means that there will be numerous large institutions realizing significant economies of scale engaged in hard information lending activities. Policymakers and regulators must ensure that there are enough of these banks to maintain significant competition so that no single bank is able to exert market power. From a systemic risk management standpoint, we should not assume that regulators will have the information and sophistication necessary to stay ahead of the banks' activities. Instead, we should require that systemically important financial institutions are highly capitalized so that they have the internal incentives to mitigate risk. Much of what regulators monitor should be left to the owners of these banks—let capital do the work of regulators. This would also greatly reduce the compliance burdens on small and regional banks who cannot afford the fixed costs of the regulatory apparatus and still compete.

While the efficiency of scale may be tempting, top-down command and control by Government over what products Americans can purchase, what loans can be extended, and how companies must operate curtails the ability of entrepreneurs to serve our fellow citizens. We must return these decisions to the private sector.

I look forward to participating in this important conversation.

PREPARED STATEMENT OF ALEXA PHILO
 SENIOR POLICY ANALYST, AMERICANS FOR FINANCIAL REFORM

JULY 12, 2023

Thank you Chair Warren and Ranking Member Kennedy for the opportunity to testify today. I want to talk about the dangers of excessive concentration and the need for the banking agencies to swiftly update and more rigorously apply their bank merger review frameworks.

President Biden issued an Executive order on Promoting Competition in the American Economy that encouraged the banking agencies to review current practices and adopt a plan, no later than 180 days after his issuance of Executive order to revitalize merger oversight.¹ President Biden's order made it clear: this is the time to fight consolidation, not facilitate it. However, almost 2 years later, the agencies have yet to publish new guidelines. They have not gotten tougher in the ways needed to stop blithely approving mergers and start conducting robust assessments of bank mergers that properly scrutinize impacts on communities, market competition, and financial system stability.

We at Americans for Financial Reform (AFR) are deeply concerned about concentrated power in banking, and the wave of bank mergers and acquisitions that have facilitated it, mergers and acquisitions approved by the Federal bank regulators, not just in the last several years, but over the past few decades. 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.² More than three-quarters of local banking markets were considered uncompetitive in 2021, with a Herfindahl-Hirschman Index (HHI) exceeding the DOJ's threshold for "high concentration." Nonetheless, Federal bank regulators have not formally rejected a merger application in over 15 years.³

On the contrary, approval rates for bank mergers have reached record highs, as the agencies have waved through mergers more quickly than ever.⁴ In 2021, the fifth-biggest bank in the country, U.S. Bancorp announced an agreement to acquire MUFG Union Bank for \$8 billion.⁵ This and other megamergers 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.

Civil rights and consumer financial justice organizations including AFR raised concerns about abusive overdraft practices in particular as an example of serious consumer harms that needed to be taken into account, along with systemic risk and consolidation issues, around TD Bank's application to merge with First Horizon. The banks ultimately announced the termination of their merger agreement, citing uncertainty about regulatory approval.

The agencies' history of rubber-stamping bank mergers has come at a cost, with marginalized and rural communities disproportionately affected. 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 can harm consumers in general and low- and moderate-income (LMI) neighborhoods in particular, including in light of past experience on how mergers have harmed small businesses, community banks, and households, especially those in BIPOC (Black, Indigenous, and people of color) and rural communities.

Bank mergers have reduced availability of credit, increased fees for basic banking services, and lowered the interest rates offered to depositors.⁶ These adverse effects are even more pronounced in communities of color and LMI communities where

¹President Joseph R. Biden. "Executive Order on Promoting Competition in the American Economy". July 2021.

²As of March 31, 2023, there were 4,096 commercial banks, including 4,096 commercial banks and 576 savings and loan associations in the U.S. insured by the Federal Deposit Insurance Corporation (FDIC) with U.S.\$23.7 trillion in assets. "FDIC Quarterly". Federal Deposit Insurance Corporation.

³Kress, Jeremy C. "Modernizing Bank Merger Review". 37 *Yale Journal on Regulation*. 2021.

⁴Supra n. 2 at p. 445.

⁵AFR and CRL Letter sent to the Fed on TD Bank/First Horizon Bank Merger and Overdraft Fees (ourfinancialsecurity.org).

⁶Bord, Vitaly M. "Bank Consolidation and Financial Inclusion: The Adverse Effects of Bank Mergers on Depositors". December 2018 at 6–9.; Mark J. Garmaise and Tobias J. Moskowitz. "Bank Mergers and Crime: The Real and Social Effects of Credit Market Competition". 61 *J. Fin.* 495, 509–14 2006.

bank consolidation has led to significant branch closures.⁷ 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.⁸ Furthermore, many merging banks have a history of poor consumer protection safeguards.⁹

One study found that Black mortgage applicants are less likely to get mortgages in counties where bank mergers occur and that divestitures from mergers exacerbate racial mortgage disparities.¹⁰ Additionally, merging banks tend to reduce their mortgage lending after completing a deal and the decline in mortgage lending is more pronounced to Black borrowers. A 2020 study found that while merging banks made more loans to prime borrowers, they curtailed lending to subprime borrowers after the merger.¹¹ These impacts are felt most strongly among Black and Hispanic mortgage applicants and already underserved communities.¹²

Bank mergers continue to drive large numbers of branch closures, and this disparately affects places where few branches existed, especially rural areas and low-income urban areas.¹³ Between 2008–2016, 86 new banking deserts were created in rural areas, according to a study by the National Community Reinvestment Coalition (NCRC).¹⁴ An updated study showed that bank mergers account for at least some branch closures. For example, BB&T and SunTrust Banks closed 565 (16.5 percent) branches nationally due to their merger into what is now Truist Bank.¹⁴

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.¹⁵

Bank mergers' harmful effects also extend to 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,¹⁶ and increasing the cost of credit.¹⁷ Small business lending is particularly affected when a community bank is acquired by a nonlocal bank.¹⁸ 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.¹⁹ Communities affected by bank mergers also suffer rising unemployment, declines in median income, and rising income inequality.²⁰ 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. As the Federal Reserve's own research demonstrates, distress at one large bank poses a significantly greater systemic risk

⁷Dymski, Gary A. "The Bank Merger Wave: The Economic Causes and Social Consequences of Financial Consolidation". *Review of Industrial Organization* Vol. 19. No.4. Pp. 249–50. December 2001.

⁸Supra n. 7. Bord. Pp. 23–25.

⁹Dymski, Gary A. "The Bank Merger Wave: The Economic Causes and Social Consequences of Financial Consolidation". *Review of Industrial Organization*. Vol. 19. No.4. Pp. 249–50. December 2001.

¹⁰Gam, Yong Kyu, and Yunqi Zhang. Southwestern University of Finance and Economics and Nankai University. "Dismembered Giants: Bank Divestitures, Local Lending, and Housing Markets". 55th American Real Estate and Urban Economics Association. January 2019. Pp. 4 and 41.

¹¹Ratnadiwakara, Dimuthu, and Vijay Yerramilli. Louisiana State University and University of Houston. "Effect of Bank Mergers on the Price and Availability of Mortgage Credit". September 2020. P. 21.

¹²Id. at pp. 1 and 6.

¹³Jad Edlebi. NCRC Research. "Bank Closure Update (2017–2020)". Accessed September 2022.

¹⁴NCRC. "Bank Branch Closures From 2008–2016: Unequal Impact in America's Heartland". Accessed September 2022. Supra n. 7.

¹⁵Supra n. 7. Bord, Pp. 30–32; Garmaise and Moskowitz, Pp. 518–523.

¹⁶Berger, Allen N., et al. "The Effects of Bank Mergers and Acquisitions on Small Business Lending", 50 *J. Fin. Econ.* 187, 217, 222. 1998; Craig, Steven G., and Pauline Hardee. "The Impact of Bank Consolidation on Small Business Credit Availability", 31 *Journal of Banking and Finance* 1237, 1248–58. 2007; Sapienza, Paola. "The Effects of Banking Mergers on Loan Contracts". 57 *Journal of Finance* 329, 364. 2002.

¹⁷Supra n. 7. Garmaise and Moskowitz, P. 515; Supra n. 12, Sapienza, pp. 329, 364.

¹⁸Jagtiani, Japa, and Raman Quinn Maingi. "How Important Are Local Community Banks to Small Business Lending? Evidence From Mergers and Acquisitions". Pp. 18–20. Working Paper. Revised August 2019.

¹⁹Supra n. 7. Garmaise and Moskowitz, P. 515.

²⁰Id. at p. 518.

than distress at a number of smaller banks with equivalent total assets.²¹ 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.²² 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.”²³ “Too big to fail” describes a firm that is so deeply ingrained in an economy that its failure would be disastrous to that economy. Too-big-to-fail status can distort competition in banking markets by allowing large conglomerates to enjoy more favorable financing than their smaller rivals.²⁴

The mergers that came as a result of the 2023 banking crisis further fueled “too-big-to-fail” and “too-big-to-manage” risks. During the 2023 crisis triggered by SVB, the agencies acknowledged systemic risks of megabanks getting too big to manage and the Government subsidy in the form of an implicit too-big-to-fail backstop that the Government provides to the biggest banks when they or their key markets are in distress.

However, too-big-to-fail risk was amplified with JPMorgan Chase’s acquisition of First Republic, which inflated the size of JPMorgan, already the Nation’s largest bank, by \$200 billion. Financial analysts hailed it as the firm’s “best deal in decades,” estimating the deal could hand JPMorgan another \$1 billion annually.²⁵ While the transaction received regulatory approval from the FDIC—required by law to accept the highest bid and lowest cost to the Deposit Insurance Fund—it also was approved by the OCC, which is legally obligated to consider whether the proposed transaction poses a risk to the stability of the financial system due to an increase in size of the combining institutions.

As a result, JPMorgan’s acquisition of First Republic bank was approved without reckoning with “too-big-to-fail” and “too-big-to-manage” risks to the financial system and the public.²⁶ The American public would be better served by the agencies evaluating “emergency” sales through a lens broader than just the least cost to the insurance fund, including the resulting effects on financial stability, ability to effectively manage the combined entity, anticompetitive impacts, and other negative economic consequences not beneficial to communities served or the economy. The least cost calculation criteria should also be more transparent.

It is also worth noting that, when the Fed assessed SVB’s acquisition of Boston Private Bank in 2018, it discussed the risk to financial stability only qualitatively, did not disclose any quantitative metrics used and did not disclose any assessment of the impact of the merger on the communities that the acquired bank served. The Fed approved SVB’s application and, without having shown its work, noted that the resulting “organization would not be a critical services provider or so interconnected with other firms or markets that it would pose significant risk to the financial system in the event of financial distress.” This was a conclusion that subsequent events proved to be quite wrong.

Needed Actions

We strongly urge the banking agencies to act swiftly to strengthen the Bank Merger Guidelines and be full-throated and clear that robust regulation and competition, not consolidation, will lead to a healthier, safer, and more vibrant financial system.

Those opposed would have us believe that we need deregulation to check concentration, pointing to failures to effectively supervise SVB. We disagree. A supervisory failure does not, as some would have us believe, indict all supervision as being ineffective. It argues for stronger regulation and effective supervision. As the Fed’s analysis noted, specific DE-regulatory choices, urged by banks and their trade

²¹ Lorenc, Amy G., and Jeffery Y. Zhang. “The Differential Impact of Bank Size on Systemic Risk”, Fed. Reserve Bd. Fin. and Econ. Discussion Series, Working Paper No. 2018-066, 2018. Pp. 12–18.

²² Wilmarth, Arthur E. “Raising SIFI Threshold to \$250B Ignores Lessons of Past Crises”. *American Banker*. Feb 2018.

²³ Kress, Jeremy, C. Kress, “Solving Banking’s ‘Too Big To Manage Problem’”. 104 *Minnesota Law Review* 171. 2019. Pp. 186–192.; Menard, Lev. “Too Big To Supervise: The Rise of Financial Conglomerates and the Decline of Discretionary Oversight in Banking”, 103 *Cornell Law Review*, Pp. 1527, 1583. 2019.

²⁴ Balasubramanian, Bhanu, and Ken B. Cyree. “Has Market Discipline Improved After the Dodd-Frank Act?”, 41 *Journal of Banking and Finance*. Pp. 155, 165. 2014; Acharya, Viral V., et al. Working Paper No. 79700. “The End of Market Discipline? Investor Expectations of Implicit Government Guarantees”. February 2016. Pp. 30–33.

²⁵ “‘First Republic (FRC) May Be Best JPMorgan (JPM) Deal in Decades’, Dick Bove Says”—Bloomberg, Breanna Bradham, May 1, 2023.

²⁶ “‘First Republic (FRC) May Be Best JPMorgan (JPM) Deal in Decades’, Dick Bove Says”—Bloomberg, Breanna Bradham, May 1, 2023.

associations, led to the oversight failures that enabled SVB's excessively risky actions and led to its failure. Also regulations to promote competition, level playing fields and oversee systemic risk do not categorically squelch innovation and heterogeneity of business models; they can in fact do the opposite.

As the recent crisis reminded us once again, banks are profoundly subsidized by the public, and they must function to serve the needs of the American people and businesses, not the other way around—and it is regulators' critical task to ensure this is so. We recommend the following actions to reduce the risks of dangerous concentration and promote a safer more competitive financial system:

Banking Agencies

- The banking agencies should pause merger approvals until their Bank Merger Guidelines are strengthened.
- The banking agencies should work together to conduct a retrospective analysis of the impact of prior banking mergers on consumers and communities, including with regard to the costs and prices of banking products, the availability and quality of credit for households and small businesses.
- The banking agencies should fulfill their statutory obligation to determine how a proposed merger will benefit the needs of its community with a robust Community Benefits Assessment. This assessment should consider other relevant factors in addition to a bank's CRA rating such as: guaranteeing that a merger is in the public interest by requiring CFPB approval if consumer products are involved; requiring disclosure of discussions between the institutions and regulators pre-filing of a merger application; requiring regulators to examine the anticompetitive effects on individual products; and requiring an evaluation of merger impact on product quality or potential exploitation of consumers.
- The banking agencies should demand evidence during the merger review process that mergers will produce measurable benefits to impacted consumers such as expanding credit, lowering fees, expanding product offerings and increasing access to low cost bank products and services, especially in BIPOC communities.
- The supervising banking agency(ies) should evaluate, in coordination with Federal and State banking agencies, and State AGs, the potential negative impact proposed mergers could have on systemic risk including wholesale investment banking, managerial competence, and compliance with consumer protection and other banking laws.
- The banking agencies should apply appropriate skepticism for banks subject to enforcement actions or with large numbers of consumer complaints at the FTC and the CFPB and coordinate to review the consumer protection and fair lending record of proposed merging banks, the cost structure and availability of account and loan products, the performance serving lower-income applicants and applicants of color in providing mortgage, small business, and other loan products.
- The banking agencies and DOJ should more rigorously enforce and monitor Fintech companies and major tech platforms that enter into quasi-banking businesses for anti-trust concerns related to product tying, collusion, vertical mergers and arrangements as well as horizontal mergers between fintechs.

Department of Justice

- The DOJ should lower the HHI threshold for enhanced scrutiny of proposed mergers.
- The DOJ should determine whether common ownership of banks by large asset managers causes competitive harms in ways not captured in the current HHI analysis.

Federal Deposit Insurance Corp

- The banking agencies and Congress should include consideration of other criteria such as impact on systemic risk and on communities and small businesses. The FDIC should assess ways to improve least cost decision criteria, at a minimum, to make it more transparent.

Federal Reserve

- For any firm offering deposit-like obligations via online platforms, the Federal Reserve or other relevant agency should regulate these products as deposits so they can not be issued without the approval of banking regulators.

To conclude, the above proposals are needed to protect the American public and combat the hands-off approach to merger reviews that has resulted in increased con-

solidation and inflicted substantial harm on the economy, small businesses and communities, rural and Black, Indigenous, (and) People of Color communities.

Thank you for your time and consideration of these points. We would greatly value your support.

ADDITIONAL MATERIAL SUPPLIED FOR THE RECORD
STATEMENT SUBMITTED BY BETTER MARKETS



The Review Process for Bank Mergers and Acquisitions Is Seriously Deficient, Allows Too-Big-to-Fail to Proliferate, and Fails to Protect Consumers

July 11, 2023

Introduction

The country benefits from a diversified banking system, from community banks to regional banks to large banks. Done right, bank mergers can be a healthy part of that system but, done wrong, they can be destructive and counterproductive. Unfortunately, the current merger process is seriously deficient, impairing the viability of community banks, allowing the elimination of healthy competition, and creating gigantic too-big-to-fail banks that cannot be resolved without catastrophic damage to the country.¹

The foundation of the U.S. banking system is the community bank.² They are the lifeblood of almost every town in America, supplying banking services and credit to Main Street families, small businesses, and farms. They know and fund the local car and truck dealers, pharmacy and food stores, hardware and farm supply stores, and gas and repair stations, while also supporting local sports teams, town days, and other community events and activities. This foundation, however, is being undermined by threats from a failed merge policy that favors and enables large and too-big-to-fail ("TBTF") banks at the expense of community banks.

The dramatic increase in the largest, TBTF banks over the last several years and decades starkly illustrate these failures and should concern everyone given the catastrophic threat they pose to the financial system and economy as well as to the livelihoods and standard of living of every American. That threat became a reality in the 2008 financial crisis ("2008 Crash"), causing a [\\$20 trillion impact](#) to the economy through the massive number of lost jobs and homes and in far too many cases the loss of a lifetime of personal savings.

That continuing threat is why TBTF banks on the brink of collapse and catastrophe are bailed out by policymakers, rather than allowed to fail and go bankrupt like nearly every other company in America. The three bank failures in spring 2023 were among the largest in history and prove that TBTF is stronger than ever. This special carve out from the most basic rules of capitalism not only creates indefensible moral hazard but allows those banks to shift the costs of their unwise, negligent, reckless, or illegal conduct to the public. Together, the failures of Silicon Valley Bank, Signature Bank, and First Republic have directly [cost more than \\$30 billion](#). It is the worst example of privatizing gains and socializing losses.

The creation of ever-bigger banks can also lead to a reduction in the availability of consumer banking products and services, [increased costs](#) associated with products and services,³ or even a lack of access altogether when bank branches are closed. For those with insufficient access to banking services, there is increased use of alternative and costly financial services such as check cashing or payday loans. Additionally, the size of and

¹ These circumstances are made worse by the failure to properly regulate and supervise large banks as was made painfully clear in the recent bank failures. See Better Markets Fact Sheet *Ten Actions Necessary to Prevent Large Bank Failures, Strengthen the Financial System, and Protect Main Street Families* (May 9, 2023), https://bettermarkets.org/wp-content/uploads/2023/05/Better_Markets_Policy_Brief_SVB_Banking_Crisis_Responses_5-9-2023.pdf.

² As of March 31, 2023 (latest data available), there were 4,230 community banks in the U.S. according to the [FDIC's definition](#). 3599 of these institutions had total assets below \$1 billion.

³ See Vitaly M. Bord (2018). Working Paper. "Bank Consolidation and Financial Inclusion: The Adverse Effects of Bank Mergers on Depositors [Job Market Paper]." Harvard University, https://scholar.harvard.edu/files/vbord/files/vbord_bank Consolidation and financial inclusion full.pdf.

[access to](#) small business loans decline with a greater share of banking system assets held by larger banks,⁴ making it more difficult to open or sustain successful small businesses that can lead to increased employment and [higher incomes](#) for community residents.

The current process utilized by the banking regulatory agencies ("Agencies")—Federal Reserve ("Fed"), Office of the Comptroller of the Currency ("OCC"), and Federal Deposit Insurance Corporation ("FDIC")—to review applications by banks that want to acquire or merge with another bank ("merger review process") is grossly insufficient. It has allowed the TBTF problem to proliferate and become larger and harder to solve. The Agencies must update their merger review process to more fully account for the risks to consumers, taxpayers, the financial system and stability, and, ultimately, the economy. Otherwise, this trend of increasing and basically unchecked consolidation within the banking system will continue, increasing the threat of catastrophic damage as was caused by the 2008 Crash.⁵

A Long History of Bank Mergers and Acquisitions Supported by An Insufficient Merger Review Process Has Led to Immense Consolidation, Reduced Competition, and Increasing Risks within Our Banking System

An insufficient merger review process, combined with other factors such as changes in laws and economic events, has contributed to massive consolidation in the banking industry over the last three-and-a-half decades. Since the mid-1980s, the number of commercial banks has declined by roughly 70 percent. The pace of mergers increased substantially after Congress passed a law in 1994 that codified the right to interstate banking at a national level.⁶ That consolidation became a frenzied merger wave after the 1999 Gramm-Leach-Bliley Act repealed the portion of the Glass-Steagall Act of 1933 that required the separation of commercial banking, investment banking, and insurance, resulting in more than 30 banks being merged into just four gigantic, too-big-to-fail banks by the time of the 2008 Crash.⁷ The 2008 Crash then resulted in government-brokered takeovers of large, failing Wall Street banks by already TBTF banks.⁸ Finally, in spring 2023, bank consolidation was made worse when regulators facilitated the acquisition of the three failed institutions,⁹ including allowing the largest U.S. bank, JPMorgan Chase, to get even bigger.

⁴ An examination of national data from the Federal Financial Institutions Examination Council on assessments related to the Community Reinvestment Act shows that the average small business loan size decreases significantly across bank groupings of increasing size.

⁵ Of course, other policymakers must also fulfill their responsibilities regarding mergers. See Remarks by Assistant Attorney General Jonathan Kanter, U.S. Department of Justice, *Promoting Competition in Banking* June 20, 2023, <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-address-brookings-institution>.

⁶ The Riegle-Neal Interstate Banking and Branching Efficiency Act, 12 USC § 1811.

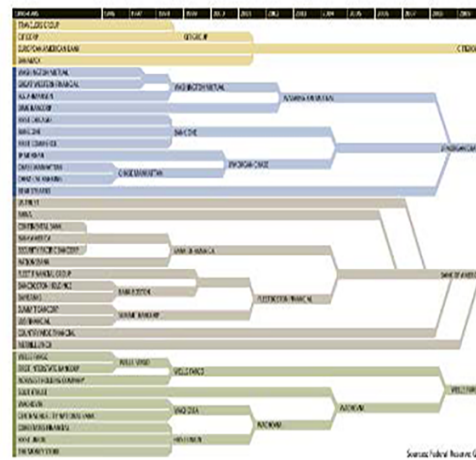
⁷ See Better Markets FactSheet, *Glass-Steagall Financial Reform Law and Efforts to Reinstate It* (July 29, 2015), <https://bettermarkets.com/sites/default/files/Better%20Markets%20Fact%20Sheet%20on%20Glass-Steagall%200.pdf>.

⁸ Bank of America acquired Merrill Lynch and Countrywide Financial; JPMorgan Chase acquired Bear Stearns and Washington Mutual; Wells Fargo acquired Wachovia.

⁹ On May 1, 2023, JPMorgan Chase Bank acquired First Republic Bank, <https://www.fdic.gov/news/press-releases/2023/pr23034.html>. On March 26, 2023, First-Citizens Bank and Trust Company acquired Silicon Valley Bridge Bank, <https://www.fdic.gov/news/press-releases/2023/pr23023.html>. On March 20, 2023, New York Community Bancorp's Flagstar Bank acquired Signature Bridge Bank, <https://www.fdic.gov/news/press-releases/2023/pr23021.html>.



1990- 2009 History of Consolidation for Citigroup, JP Morgan Chase, Bank of America, and Wells Fargo



The consolidation both in number of banks and in products and services has dramatically changed the landscape of the U.S. banking industry, reducing competition, concentrating risks, and increasing financial stability concerns. Currently, the very largest banks control the U.S. banking system:

- The four largest banks hold about 40% of all assets in the banking system.
- The top ten banks hold more than half of all deposits and nearly half of all loans.
- JPMorgan Chase, Goldman Sachs, Bank of America, and Citigroup hold about 90% of the total notional amount of all derivatives contracts held by U.S. banks.

In fact, there is an ongoing race to create ever-bigger banks. Indeed, in just the last three years the three largest bank mergers since the 2008 global financial crisis were approved by the Fed and the OCC: BB&T and SunTrust banks merged in 2019 to become what is now the tenth largest bank holding company ("BHC"), creating Truist Financial, with \$548 billion in assets; PNC Bank closed its acquisition of the US operations of BBVA in 2021 and is now the ninth largest BHC with \$560 billion in assets; and this past October (2022), the acquisition of MUFG Union Bank by U.S. Bancorp was approved to make U.S. Bancorp the seventh largest BHC with \$600 billion in assets.

Additionally, TD Group US Holdings ("TD Bank") was working to acquire First Horizon Corporation, which would have created the eighth largest bank with a round \$610 billion in assets.¹⁸ The merger was delayed because of

¹⁸ Financial information for current total assets was obtained from the Federal Financial Institution Examination Council's webpage for the National Information Center, "Large Holding Companies," <https://www.ffiec.gov/nw/institution/TopHoldings>.

regulatory concerns about [TD Bank's unsatisfactory anti-money laundering practices](#). However, TD Bank did [acquire](#) Cowen Inc., an investment bank, in March 2023. With this acquisition, TD Bank joins the other mega banks with substantial capital markets operations, Truist, PNC, and U.S. Bancorp. Clearly, these banks are becoming not only much larger but also significantly more complex and interconnected throughout the financial system while engaging in more potentially high-risk activities.

Asset concentration has also increased among the very largest banks. Total assets for the five largest banks has grown to over \$12 trillion—nearly 4.5 times larger than the assets of all 4,300+ [community banks combined](#)—from about \$3 trillion twenty years ago.¹¹

The Current Merger Review Process is Grossly Deficient

The merger review process involves the consideration of four main factors:

1. anticompetitive effects,
2. financial stability risks,
3. effect on the public interest/ convenience and needs of communities served, and
4. the financial condition and management effectiveness at the merging companies.¹²

As currently designed and implemented, the merger review process ostensibly prioritizes the factor of anticompetitive effects. This seems to be in-line with the implied—but certainly not required—prioritization within the applicable laws, the Bank Holding Company Act and the Bank Merger Act. These laws are specific that a merger should not be approved if it could lead to a monopoly or if it would substantially lessen competition.

However, the laws also grant the agencies substantial discretion as to how to include the non-competition factors (financial stability, community needs, and financial and managerial resources), directing the agencies to “consider” them in the review process. This discretion allows the agencies to elevate the non-competition factors to an appropriate role in the merger review process and apply stricter scrutiny to these factors that is well beyond the current merger assessment process.

For community needs, the current merger review process relies heavily on the outcomes of the Community Reinvestment Act (“CRA”)-related assessments of the merging entities. This can be seen clearly within the approval documents of recent larger mergers. In the orders approving the [SunTrust/BB&T merger](#) and the [PNC/BBVA merger](#), the Federal Reserve noted that it “places particular emphasis on the records of the relevant depository institutions under the CRA.” This reliance [has been shown](#) to be similar for all three federal banking agencies.

Such reliance can be particularly problematic, with one of the largest issues being that CRA assessments are point-in-time and conducted periodically with data from the years prior to the assessment. Therefore, the conclusions from the CRA examination being used in the merger assessment could be out of date. Furthermore, relying on the latest CRA examination conclusions provides no consideration of how performance of the merged

¹¹ See Remarks by Acting Comptroller Michael J. Hsu, Office of the Comptroller of the Currency, Detecting, Preventing, and Addressing Too Big To Manage (Jan. 17, 2023), <https://occ.gov/news-issuances/speeches/2023/pub-speech-2023-7.pdf>.

¹² See 12 U.S.C. § 1828(c).

institution could be in the future. That is, two separate institutions may indeed be performing well in serving the needs of communities at the time of the merger assessment, but that is no guarantee that they will or plan to continue to do so. Indeed, as a motivation for a merger is often to reduce costs and eliminate so-called “redundancies”, a merger may well lead to a net reduction in services across the areas served by the two organizations prior to the merger.

To compensate for this in some merger reviews, especially larger mergers, the review process includes a request for comments from the public as well as a review and response to those comments. However, soliciting public comments is not a substitute for an up-to-date CRA examination, especially since the review and assessment of comments relies – seemingly, in large part, from the approval orders – on responses from the banks themselves and a thinly-supported, subjective assessment by the agencies. In particular, more must be done with regard to assessing the convenience and needs factor (discussed below).

Similarly, the factor of financial stability does not appear to receive appropriate scrutiny. The recent merger approval documentation from the Fed and the OCC shows that the financial stability/systemic risk review simply involved an “analysis” along the five factors that are used to determine the “score” assigned to Global Systemically Important Banks (the so-called GSIB surcharge score): size, availability of substitute providers, interconnectedness, complexity, and the extent of cross-border activities. While the GSIB surcharge scoring methodology provides a useful, very high-level framework for determining a capital surcharge, it is a crude framework that provides little insight into the many ways risks could be posed to the banking system and greater financial system by the creation of a very large bank.

Additionally, the Fed and OCC provide only subjective assessments about each of the GSIB surcharge score factors that lack any sort of thresholds leading to further consideration and scrutiny of the merger with regard to financial stability concerns. There is also almost no written justification for their conclusions, only providing basic explanations for their conclusions and not the type of robust justification that would be expected for a factor as significant as stability of the U.S. financial system. The agencies must consider the inclusion of a more thorough and deeper analysis of financial stability risks (discussed below).

The Agencies Have Started to Take Some Steps to Assess the Current Process, but They Have Yet to Take Any Action

President Biden’s [Executive Order](#) from 2021 highlighted the many detrimental impacts of consolidation throughout the economy, including in banking and the financial industry. That order encouraged the Attorney General to engage with the banking regulatory agencies to review guidelines around bank mergers for the “revitalization” of the merger oversight process. The Agencies have started to embrace the opportunity to engage with each other to enhance the merger review processes in a coordinated way.

In late 2021 the Department of Justice issued a request for information from the public on how the merger review process could be improved, focusing on their mandate of assessing competition.¹⁴ Shortly after, the FDIC

¹⁴ See Better Markets Comment Letter (February 15, 2021), <https://bettermarkets.org/wp-content/uploads/2022/02/Better-Markets-Comment-Letter-Bank-Merger-Guidelines.pdf>.

followed with their own request for information from the public that was broader in scope.¹⁴ In addition to competition, the FDIC also put a lot of emphasis on requesting input on how the merger review process could be improved for the factors of financial stability and convenience and needs. Additionally, in a June 20, 2023 [speech](#),¹⁵ Jonathan Kanter, Assistant Attorney General for Antitrust at the U.S. Department of Justice ("DOJ"), said that the DOJ would increase its scrutiny of mergers and consider additional measures of competitiveness in its analysis. Kanter also said that the DOJ would focus on providing advisory opinions and empower the financial regulators to conduct broader merger reviews.

While the Fed and OCC have not similarly solicited public feedback on how the process can be improved, they have discussed the issues and noted that the process must be enhanced. Fed Vice Chair for Supervision Michael Barr discussed the merger review process in his [inaugural speech](#) in that role, noting that convenience and needs and financial stability are important factors to consider. Acting OCC Comptroller Michael Hsu [gave a speech](#) focused on improving the merger review process, putting forward his thoughts on how assessments for the factors of competition, convenience and needs, and financial stability can be improved. Additionally, the OCC hosted a [symposium](#) in February 2023 on bank mergers with panels on competition in the sector, convenience and needs of communities, and financial stability implications.

Finally, in June 2023, Treasury Secretary Janet Yellen [indicated](#) that higher interest rates and banking industry turmoil in 2023 added incentives for additional bank mergers, which she suggested would be welcome. However, additional mergers involving the country's largest banks would likely make the existing problems around mergers and consolidation even worse and potentially make the already unacceptable threat from TBT banks much worse.

There Are Fundamental Improvements That Must Be Made to the Merger Review Process

Based on their public statements and solicitations, it is clear that the Agencies agree the merger review process needs to be updated and improved, particularly for the factors regarding the convenience and needs of communities as well as financial stability. What is not clear is how they collectively intend to achieve this goal.

As noted above, in his speech on bank mergers Acting Comptroller Hsu put forth some thoughts on how assessments based on each of the factors can be improved. Better Markets has also put forth its own advocacy agenda on this issue that overlaps with points the Acting Comptroller raised but also adds aspects. (See Better Markets comment letters linked above).

Competition Assessment

The assessment for the factor of competition involves computing a standard concentration measure, the Herfindahl-Hirschman Index ("HHI"), and applying pre-determined thresholds to determine if a market is of a sufficient level of competition. The "markets" in this analysis are defined by the Fed based on concentrations of deposits in a geographic area, similar to what is currently being done in the CRA. Additionally, as pointed out by

¹⁴ See Better Markets Comment Letter (May 31, 2022), <https://bettermarkets.org/wp-content/uploads/2022/05/Better-Markets-Comment-Letter-Request-for-Comment-Bank-Merger-Transactions.pdf>.

¹⁵ See Remarks by Assistant Attorney General Jonathan Kanter, U.S. Department of Justice, *Promoting Competition in Banking* (June 20, 2023), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-address-brookings-institution>.

the Department of Justice ("DOJ") in their request for information, the analysis is performed for (1) retail banking products and services, (2) small business banking products and services, and (3) middle market banking products and services. However, nonbank providers of financial products and services are excluded from the analysis, i.e., only banks are included.

The DOJ in its request for information asked whether the analysis should be expanded to include different determinations of "markets" and whether more types of products and services or more granular categories of products and services should be included. The Acting Comptroller stated that both inclusions should be the case, referencing [a publication](#) by former Fed Governor Daniel Tarullo who argues for more granular and broader analysis for various types of lending and different geographic market considerations (i.e., local, regional, and national) and for the consideration of broader industry dynamics that includes nonbank lenders.

This would be a much more sensible approach. Banking is a complex and dynamic business that should be providing the products and services to meet the needs of different types of consumers and businesses in different areas. These demands and needs can be very region-specific, even for a particular county. That is, the competition assessment should include:

- Ensuring appropriate sets of products and services are being reviewed for a given geographic market;
- Reviewing geographic markets at multiple levels and perspectives (Fed-defined, county-level, metropolitan area, state, national, etc.);
- Having appropriate distinctions between urban and rural markets as well as along other lines of distinctions (which can be achieved in large part through the first two points); and
- Assessing competition by performing analysis both including and excluding nonbanks.

However, while the competition factor should be improved, it is perhaps more important to improve the assessment of convenience and needs. That is, if a primary goal in assessing the benefits is to assess whether people have and will continue to have the products and services they need for financial wellbeing, then the convenience and needs factor is best suited. The factor of competition only seeks to assess whether there is sufficient competition, not whether that competition actually leads to people having the products and services they need, and so is secondary to the convenience and needs factor in assessing the benefits, if any, of a proposed merger (discussed below).

Convenience and Needs Assessment

As noted above, the assessment of convenience and needs is heavily dependent on CRA-related examinations that likely are out-of-date as well as public comments that receive very little scrutiny. This assessment process all but guarantees the convenience and needs of communities will be poorly assessed at the time of the application review and the convenience and needs going forward are entirely ignored. This must change.

First, the agencies should perform a more up-to-date analysis of CRA review-related data at the time of the merger assessment. At the very least, this analysis should be performed on home lending data, which is reported regularly (annually and, for certain banks, quarterly) and can be analyzed easily without examination teams. Once the Consumer Financial Protection Bureau begins collecting data through its proposed rulemaking

amending Regulation B to implement changes to the Equal Credit Opportunity Act made by section 1071 of the Dodd-Frank Act, this analysis could easily be performed for small businesses as well (and some form of such analysis could be performed now with current data sources). Analysis based on more current information at the time of the merger assessment is necessary not only to have a recent picture of the performance of the merging banks but also would allow the agencies to investigate some of the public comments received and provide analytical support for its conclusions.

The analysis should be performed over a robust time period, perhaps for at least a decade prior to the merger application, and use annual data instead of data grouped over several years. Analysis over a more extended time range provides insight into the performance of each of the merging banks and their behavior and business strategy within low-to-moderate income ("LMI") communities and to LMI individuals. Additionally, this insight can provide an indication of how the merged bank may perform in the future. Unlike the analysis performed in CRA examinations which pools multiple years of data, using annual data would more clearly show whether banks are consistent in their behavior year-over-year.

Second, the merger review process should include some thresholds related to both the CRA examination conclusions and any additional analysis performed that either prevent a merger from proceeding or that require certain actions and commitments. Some "unspoken" thresholds may currently exist that are discussed with the banks prior to the formal merger applications being submitted, but thresholds should be codified as part of the process so that the public has full transparency of the expectations of the agencies. A set of possible examples of remedial actions and commitments should also be published for the public's awareness, such as divesting branches or executing community benefit agreements ("CBAs"), but ultimately the actions or commitments required as part of the approval should be directly related to the identified issues.

Third, more must be done to ensure the convenience and needs of communities are served after merger completion:

- Any area in which competition is shown to be materially reduced, whether across products or for individual significant products such as mortgages, should lead to
 - o heightened scrutiny and
 - o conditions that require improvement in specific geographical areas that are monitored by regular examinations, at least annually at first, as well as more regular overall CRA-related examinations.
- The agencies should designate underserved assessment areas, which would result in
 - o elevated review scrutiny in those areas and
 - o remedial supervisory actions or commitments to improve the provision of products and services in those areas with appropriate supervisory consequences for failure to do so.

Acting Comptroller Hsu and others have highlighted the use of so-called community benefit agreements, which have been beneficial in certain cases with large bank mergers. However, the details of these agreements typically are not shared with the public, so it is impossible for the public to assess whether or not the merged banks indeed fulfilled the agreements that were put in place. Additionally, many banks take much longer to



fulfill their commitments than stated in the agreement without meaningful consequences. If these are to be used more frequently, then they must be public and come with consequences.

Financial Stability Assessment

The agencies have a duty to assess the financial stability risks resulting from the mergers they review. Systemic and financial stability risks deserve special scrutiny, especially considering the weakening of the regulatory framework implemented during the Trump era. Strengthening the merger review process around financial stability risks is necessary regardless of the regulatory framework, but the dilution of post-crisis reforms provides even more reason to do so.

Governor Lael Brainard recognized this issue in [a statement](#) made after her abstention from voting on the PNC acquisition of the U.S. operations of BBVA:

"The increases in banking concentration in the \$250 to \$700 billion asset size category, where common-sense safeguards have been weakened, raise some concerns, and it might be helpful to undertake a broader review of our framework, since we know from experience even noncomplex banks in this size range can pose risk to the financial system when they encounter financial distress."

Clearly, the agencies must do a better job of identifying and assessing systemic risks and financial stability concerns related to merger plans for large banks. The GSIB surcharge analysis discussed above is insufficient for these purposes. The GSIB surcharge framework was not designed to assess potential risks to the financial system. Rather, it was designed to apply a capital surcharge to the world's largest and most complex banking institutions. As Governor Brainard pointed out, smaller and less complex institutions that are still large by any standard can pose risk to the financial system. Therefore, comparing any potentially merged bank to GSIBs is not sufficient, unless one or more of the merging banks is already a GSIB. Even in that case more factors and information must be considered in the process. Former Governor Daniel Tarullo [aptly described](#) the current process as "analytically underdeveloped" in an opinion piece for the Brookings Institution.

First, for mergers that result in an institution with total assets greater than \$100 billion, the agencies should require the submission of a combined resolution plan for the merged entity. This should include an assessment of the ways in which the merger increases and reduces resolution challenges or obstacles. Such a plan would provide great insight into the complexity of the merged entity and its operations and allow for a more involved and appropriate assessment of the implications of its failure. After all, that is exactly the purpose of the resolution plan requirements, and so a combined plan should be required to be submitted and utilized for assessment in the merger review process. Making large banks prepare for their possible resolution is critical to addressing the too-big-to-fail problem.

In his speech, Acting Comptroller Hsu suggested that one way to address systemic risk of large mergers would be to "condition approval on credible and verifiable commitments to achieving resolvability, tailored to the resolution risks of the resulting bank." The best way to ensure this occurs is by having a resolution plan in place for the merged entity at the time of the application process, which is important for banks that are large enough to pose risk to the system, including large banks that are not GSIBs. As the Acting Comptroller also points out in that speech, if the only way to resolve a large regional is that "it would have to be sold to one of the four mega banks, then...we have a financial stability problem." Resolution preparedness is necessary to have

confidence that large banks can be shut down and/or be taken apart and sold off piece-by-piece more easily in the event the bank fails, instead of being sold off in whole to a megabank.

Second, for mergers that result in an institution above \$100 billion, more analysis must be conducted to assess risk to financial stability other than simply utilizing the GSIB surcharge metrics. As noted above, these metrics as compared to the industry as a whole or as compared to GSIBs are insufficient to determine the variety of possible risks an institution could pose to the financial system. The Federal Reserve has a division entirely dedicated to the analysis of financial stability—the Division of Financial Stability. For large mergers, the Division of Financial Stability should conduct and provide a public assessment of the financial stability concerns the merged entity could raise on its own and in the context of the banking system and greater financial system.

At the very least, an assessment should be conducted of the potential impact to funding markets that would be caused by serious distress or failure of the merged bank. It is important to remember that in 2008 Bear Stearns was around \$400 billion in assets when it required a Federal Reserve-brokered (and materially supported) fire sale, and Lehman Brothers was around \$640 billion at the time it collapsed. These firms' distressed financial condition significantly contributed to stress in short-term funding markets, which are critical to the functioning of the financial system.

Managerial Resources and Other Identified Weaknesses Assessment

Consideration of prudential factors should be a major element of any decision making on mergers of large banks, and if there are significant weaknesses in key areas a large bank merger should be rejected. This is critical because any weaknesses identified in either or both of the merging institutions could become even larger concerns once the merger is complete. That is, the increased size, complexity, and interconnectedness of the resulting institution would increase the potential risks resulting from deficiencies among prudential factors. For larger institutions, this increased risk can result in financial stability concerns.

First, the combining of two banks into a larger one that would then not be adequately capitalized, or have insufficient liquidity, should never be allowed. Specifically, the capital and liquidity analysis of a large bank merger should include *pro forma* stress-based measures of capital adequacy and liquidity sufficiency. Just as with an existing large bank, the resulting combined bank must be able to demonstrate it can likely withstand potentially severe stress and still be able to continue to operate and lend to creditworthy borrowers without tax-payer support. If the merged entity cannot demonstrate that it could withstand stress consistent with the Federal Reserve's annual stress test and maintain sufficient liquidity in times of stress, there should be no approval of a merger.

Second, demonstrated material weaknesses in key risk management and corporate governance practices or evidence of a failure to comply with applicable laws or rules should form an important element of any merger consideration. Identified weaknesses would provide a strong indication that bank management and the banks' board of directors are not effectively carrying out their responsibilities, and any planned merger should be prohibited. If the problems are at a bank whose operations will be folded into a merging or acquiring institution, then at a minimum the application process should require a written agreement with a detailed accounting of weaknesses at the target bank and a plan that specifically lays out how and when the problems will be addressed by the acquiring bank. The merged bank's operations should be contingent on the commitment to resolve identified weaknesses. If the merger is approved and material problems linger, the merged entity should face



meaningful supervisory actions, including having all capital distributions to shareholders suspended until such time as it has addressed the issues detailed in the plan submitted as part of the application.

Should material identified weaknesses be at the acquiring bank, any merger or acquisition should not be allowed until the specific issues have been fully addressed. It should not be the case that an institution with significant identified weaknesses be allowed to acquire another institution, since its issues likely will be continued as part of the larger, merged operation.

Parts of this fact sheet were originally published in February 2023.



Better Banks | Better Businesses
 Better Jobs | Better Economic Growth
 Better Lives | Better Communities

Better Markets is a public interest 501(c)(3) non-profit based in Washington, DC that advocates for greater transparency, accountability, and oversight in the domestic and global capital and commodity markets, to protect the American Dream of homes, jobs, savings, education, a secure retirement, and a rising standard of living.

Better Markets fights for the economic security, opportunity, and prosperity of the American people by working to enact financial reform, to prevent another financial crash and the diversion of trillions of taxpayer dollars to bailing out the financial system. By being a counterweight to Wall Street's biggest financial firms through the policymaking and rulemaking process, Better Markets is supporting pragmatic rules and a strong banking and financial system that enables stability, growth, and broad-based prosperity. Better Markets also fights to refocus finance on the real economy, empower the buy-side and protect investors and consumers.

For press inquiries, please contact us at press@bettermarkets.org or (202) 618-6430.



STATEMENT SUBMITTED BY THE BANK POLICY INSTITUTE

GLR – 7-11-23

Statement for the Record

Bank Policy Institute

Senate Committee on Banking, Housing and Urban Affairs Subcommittee on Economic Policy

Hearing: “Bank Mergers and the Economic Impacts of Consolidation”

July 12, 2023

The Bank Policy Institute welcomes the opportunity to provide input on today’s Senate Banking Committee Subcommittee on Economic Policy hearing on “Bank Mergers and the Economic Impacts of Consolidation.” The subject of this hearing has far-reaching implications for the vitality of the American banking sector and the future of the U.S. economy.

Scale in banking has inherent benefits that ripple throughout the economy.¹ Merging banks can invest more in costly technology upgrades that protect their customers’ data and help them access services more conveniently. They can reach more customers through enhanced digital channels and expanded branch footprints. And they can reduce costs through economies of scale, enabling them to lower costs for customers.

Despite these benefits - and despite a diverse financial services sector, with banks of all sizes competing in every corner with fintechs and big tech firms - there is a view among some policymakers that “big is bad” in banking. That view ignores the thriving competitive banking landscape and the benefits that large, diversified banks bring to the economy. It is also inconsistent with evidence: for example, the notion that bank mergers cause banking deserts is unfounded.²

The banking turmoil this spring brought more urgency to the M&A issue. The episode illustrated the contrast between a chaotic and costly failure such as Silicon Valley Bank’s and the more organized and less disruptive acquisition of First Republic. It also highlighted the benefits of diversification from safety and soundness and financial stability perspectives. When a bank is too weak to stand on its own, a merger can be the most optimal outcome for customers and other stakeholders. Just as taking preventive steps to strengthen a healthy patient is preferable to emergency surgery, mergers between healthy banks are better than eleventh-hour transactions in a failure. Openness to bank M&A among top policymakers is necessary to ensure the banking system remains healthy even under stress and continues to meet the needs of customers.

It is encouraging to see policymakers such as Acting Comptroller Michael Hsu³ and Treasury Secretary Janet Yellen⁴ express receptiveness to bank M&A. But these comments have coincided with confusing and conflicting messages from other senior policymakers. As the banking sector moves on from a

¹ Bank Policy Institute, “Banks thrive at scale, and so do consumers”, Feb. 10, 2022, available at

<https://bpi.com/banks-thrive-at-scale-and-so-do-consumers/>.

² Bank Policy Institute, “Exposing some serious untruths about bank mergers, bank branches and banking access”, Jan. 18, 2022, available at <https://bpi.com/exposing-some-serious-untruths-about-bank-mergers-bank-branches-and-banking-access/>.

³ Hsu, Michael J., testimony before the House Financial Services Committee, May 16, 2023, available at <https://docs.house.gov/meetings/BA/BA00/20230516/115922/HHRG-118-BA00-Wstate-HsuM-20230516.pdf>. “The OCC is committed to being open-minded when considering merger proposals and to acting in a timely manner on applications, consistent with the requirements of the Bank Merger Act.” (p. 4).

⁴ Reuters, “Yellen expects US regulators to be open to mergers among midsize banks”, May 12, 2023, available here: <https://www.reuters.com/markets/yellen-expects-us-regulators-be-open-mergers-among-midsize-banks-2023-05-13/>.

GLR – 7-11-23

stressful period, an acknowledgment from policymakers of the benefits of bank M&A would be a welcome step.

Clear expectations and timelines for merger approvals would also enable banks to make informed decisions about growth through M&A. The current process is fraught with delays and uncertainty, despite clear statutory standards.⁵ Recent comments from the Department of Justice antitrust chief⁶ suggest the process could soon become even more opaque, subjective and unpredictable. Languishing merger bids have tangible costs for bank customers, employees and investors, who may choose to leave a bank stuck in deal limbo.

We encourage the Subcommittee to consider the economic benefits of bank M&A and the costs of precluding it. A predictable path forward for bank mergers promotes a healthier banking system and a more stable U.S. economy.

⁵ Law360, “Banks’ wait time for Fed deal blessing hits decade high”, May 24, 2023, available at <https://www.law360.com/articles/1680804/banks-wait-time-for-fed-deal-blessing-hits-decade-high>.

⁶ Kanter, Jonathan, Keynote Address at the Brookings Institution’s Center on Regulation and Markets Event “Promoting Competition in Banking”, June 20, 2023, available here: <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-address-brookings-institution>.

LETTER SUBMITTED BY CUNA



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99 M Street SE
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July 12, 2023

The Honorable Elizabeth Warren
Chair
Subcommittee on Economic Policy
Committee on Banking, Housing, and Urban Affairs
United States Senate
Washington, DC 20510

The Honorable John Kennedy
Ranking Member
Subcommittee on Economic Policy
Committee on Banking, Housing, and Urban Affairs
United States Senate
Washington, DC 20510

Dear Chair Warren and Ranking Member Kennedy:

On behalf of the Credit Union National Association (CUNA), I am writing regarding the hearing entitled, "Bank Mergers and the Economic Impacts of Consolidation." CUNA represents America's credit unions and their more than 135 million members.

Branch Closures Associated with Bank Mergers Harm Consumers

We thank the Subcommittee for holding a hearing looking into the impact of bank mergers and bank consolidation. America's credit unions have been paying close attention to the trend of bank mergers over the last several years, as this activity has left consumers suffering from associated branch closures, often finding themselves in banking deserts. A recent FDIC paper published by the St. Louis Federal Reserve finds that there are over 1,130 banking deserts and 1,155 potential deserts in the United States.¹ In fact, CUNA's research estimates that the count of census tracts that are banking deserts have increased by 60% from 2012-2022.

Bank mergers undoubtedly lead to branch closures. From 2012-2022, the number of bank branches decreased from 96,292 to 78,626. In that same period, the number of credit union branches increased from 21,274 to 21,193. Additionally, from December 2019 to March 2023, credit unions have opened a net of 700 branches while banks have lost a net of 7,500. The decrease in bank branches demonstrates bankers' profit over people approach to financial services. In contrast, the growth in credit union branches shows the commitment to providing services and being physically present in those communities as well. Credit unions will never apologize for our dedication to providing financial services and ensuring the financial well-being for all, including the financially vulnerable. Credit unions cannot match the sheer number of bank branches. But we stand ready, willing, and able to help reverse the negative trends that for-profit banks have put into motion.

Credit Union Field of Membership

America's credit unions exist to improve their members' financial well-being and advance the communities that they serve. This means ensuring that all consumers, regardless of residence or economic standing, have access to mainstream financial services. That is why we believe it is critical that underserved communities have access to a trusted, local financial partner.

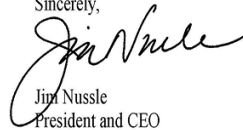
¹ <https://www.stlouisfed.org/publications/regional-economist/second-quarter-2017/banking-deserts-become-a-concern-as-branches-dry-up>

Despite credit unions outperforming banks with regard to branch growth, credit unions still face challenges in reaching consumers abandoned by banks due to outdated field of membership restrictions. We believe that credit union field of membership expansion will successfully alleviate financial burdens placed upon consumers as a result of bank branch closures. Any serious discussion of policy remedies to address access to financial services in banking deserts and underserved communities must include modernizing laws and regulations which hinder credit unions from serving those the banks have left behind. We continue to work with Members of Congress to introduce legislation expanding our field of membership. We strongly encourage the Senate Banking Committee to look into field of membership expansion today and in future committee hearings.

Conclusion

On behalf of America's credit unions and their more than 135 million members, thank you for holding this important hearing and considering our views.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim Nussle", written over a printed name and title.

Jim Nussle
President and CEO

**STATEMENT SUBMITTED BY THE MASSACHUSETTS BANKERS
ASSOCIATION**

Statement for the Record

On Behalf of the Massachusetts Bankers Association

before the Subcommittee on Economic Policy

Of the

Senate Committee on Banking, Housing and Urban Affairs

July 12, 2023

The Massachusetts Bankers Association (MBA),¹ appreciates the opportunity to provide a Statement for the Record for this hearing, *Bank Mergers and the Economic Impacts of Consolidation*. We are pleased that the Subcommittee is bringing attention to the important issues involved in assessing the impact and importance of banking industry mergers and consolidation. These issues include how bank mergers can benefit competition while maintaining a high level of customer financial services at fair pricing, and how to more accurately measure and account for the increasing level of nonbank competition in the “banking” market. Ultimately, policymakers should ensure that banks have the option to consider mergers under reasonable conditions and receive regulatory feedback in a reasonable timeframe.

Mergers Can Benefit Competition and Consumers

According to the FDIC’s most recent Deposit Market Share Report, 132 FDIC-insured banks have a depository presence in the Commonwealth. All but eight hold deposits under \$10 billion, the vast majority of which are community banks. Massachusetts community banks operate in a highly competitive environment, and for some of our members, bank mergers are one of the options that allow them to remain competitive. The profound changes in financial services including the technology needed to protect and meet consumer demand in recent decades mean

¹ The Massachusetts Bankers Association represents 132 commercial, savings, cooperative, and federal savings banks and savings and loan associations with approximately \$380 billion in local assets, 72,000 employees across Massachusetts and New England, over 2,000 banking locations, more than 4,500 ATMs, and donate more than \$105 million annually to social agencies and charitable organizations across the Commonwealth. For further information, visit www.massbankers.org

that assessing the benefits and impacts of banking industry mergers and consolidation defies a simple, broad-brush approach, however. Further, a bank's decision to merge with another is often a succession planning strategy, whereby bank management and Board members can align their bank with another organization that they trust, that will continue their community commitment and integrate staff into the combined operation. Bank customers benefit from a wide array of choice in products and services, but assuming that consolidation always narrows those choices ignores important practical considerations.

For example, as Federal Reserve Chair Powell noted in his 2022 confirmation hearing,² many rural counties have experienced serious population loss, and in many cases the bank(s) in those markets have faced severe pressure to meet fixed costs (regulation, technology investment, cybersecurity, and others) to continue serving a shrinking customer base. In such cases a merger with another institution may be the best way to preserve banking services to the remaining customers and avoid losing entirely a banking presence in the market.

In 1995, the Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice noted that “[t]o 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.”³ Similarly, Acting Comptroller of the Currency Michael Hsu recently noted that, though merger analysis should be updated to reflect the profound financial market changes since 1995, the goal should not be to prevent mergers, but to revise assessment standards so that the broad benefits of mergers are realized.⁴ Not all community banks will find a merger to be the best option for keeping healthy and maintaining a high level of community service, but for all these reasons, the option should be available under reasonable conditions and in a reasonable timeframe.

According to the 2022 Conference of State Bank Supervisors (CSBS) Community Bank national survey, achieving economies of scale was the number one motivating factor driving a community bank's decision to make an acquisition offer (77% said extremely or very important).⁵ Similarly, an inability to achieve economies of scale was the primary driver of a community bank's decision to accept a merger and acquisition (M&A) offer (70.6% said extremely or very important).

These considerations are especially acute for a subset of Massachusetts banks: mutual institutions, which do not issue stock to investors. Out of 102 commercial banks and savings associations headquartered in the Commonwealth, 80 are organized in mutual form, either directly or as subsidiaries of mutual holding companies. These institutions, some of which have

² See <https://www.c-span.org/video/?517047-1/federal-reserve-chair-confirmation-hearing>, Response to Senator Smith at 1:58:06.

³ Anne K. Bingaman, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust and Banking (Nov. 16, 1995) (<https://www.justice.gov/atr/speech/antitrust-and-banking>).

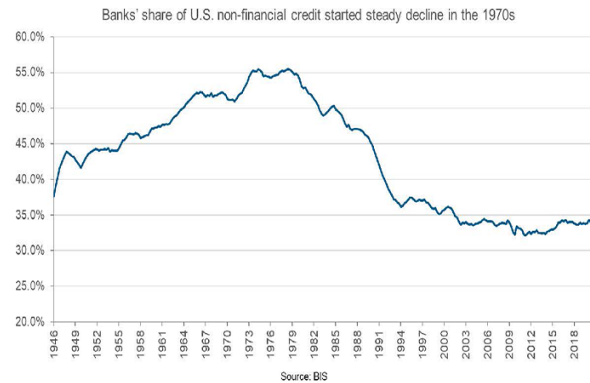
⁴ See <https://www OCC.treas.gov/news-issuances/speeches/2022/pub-speech-2022-49.pdf>

⁵ See https://www.csbs.org/system/files?file=2022-09/CB22pub_2022_survey_Final_n092122.pdf

been in business for over a century, accumulate capital primarily through retained earnings. Though legal options exist to convert to stock form and raise capital from investors, these institutions are committed to maintaining the community ties that the mutual form supports. Yet they face the same pressures of capital expansion and operational scale that their investor-owned competitors face. There have been successful mergers of mutual institutions that preserved the mutual character in a stronger, more competitive resulting community bank. Without the merger option, such a successful outcome would have been more doubtful, to say the least.

Current Competitive Analysis Fails to Measure Non-Bank Competition

Another key consideration in bank merger policy debates is the need to reflect accurately the true competitive environment for financial products and services in which banks operate. Unfortunately, the current methods employed by regulators to measure the competitive impact of a proposed bank merger (such as the Herfindahl-Hirschman index, or HHI, which measures market concentration) fail to adequately capture the universe of institutions that offer competing products and services. This is because over the past few decades, a significant amount of “banking” activity has moved out of the banking sector. According to Bank for International Settlements (BIS) data, banks’ share of total non-financial credit in the U.S. declined from 55% in 1974 to 32% in 2021.



The BIS data is consistent with the findings of an FDIC report,⁶ which observed that the rise of loan securitization in the 1970's coincided with the decline in banks' share of total loans across lending categories like residential and multifamily mortgages. Essentially, the “banking” market is much larger than just banks.

⁶ See <https://www.fdic.gov/analysis/quarterly-banking-profile/fdic-quarterly/2019-vol13-4/fdic-v13n4-3q2019-article1.pdf>

Banks' Market Share of Loan by Type of Loan, U.S.					
Type of Loans	Bank Share of Loans Outstanding (%)				
	1980	1990	2000	2010	2020
Total Loans	64	49	38	35	40
excluding GSEs	73	64	55	55	63
1-4 Family Mortgages	66	40	30	25	22
CRE mortgages	51	50	49	48	49
Commercial mortgages	54	52	54	54	59
Multifamily residential mortgages	47	44	34	30	30
Consumer credit	57	52	35	45	40
Agriculture loans	23	39	51	46	40
Sources: Federal Reserve, FDIC, USDA					

While precise analysis is complicated by data limitations, community banks face significant competitive pressure from nonbanks in their local markets. The findings of the 2022 CSBS community bank survey underscore this point. Community banks were asked to identify the institutions they primarily compete with for a variety of products and services. While competition from community and regional banks is strongest in most categories, a significant share of respondents indicated they primarily compete with credit unions and other nonbanks for products including small-dollar unsecured loans, wealth management services, mortgages, and payment services.⁵

Conclusion

Banks operate in a highly competitive environment. The opportunity for banks, especially community banks, to merge or acquire another institution often functions as a way to preserve a more competitive environment and banking services to the community, and these opportunities should not be discouraged. In fact, we respectfully urge Congress to consider updating the current regulatory environment to reflect the competitive landscape and the increasing level of non-bank competition more accurately in the “banking” market.