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Mr. Makan Delrahim
Assistant Attorney General
U.S. Department of Justice, Antitrust Division
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Assistant Attorney General Delrahim:

I write in response to the Department of Justice's (DOJ's) Antitrust Division's (the Division's) recent request for comment on its Bank Merger Review Guidelines.[1] As the announcement notes, these guidelines remain largely unchanged from the initial version released in 1995.[2] After 25 years and a wave of bank industry mergers,[3] it is critical that the Division revisit these guidelines to protect competition in the banking industry. However, I am concerned that the Division's request for comment suggests that DOJ seeks to weaken the already insufficient process currently in place to review bank mergers, making it even easier for these mergers to occur. Weakening these rules will reduce competition and exacerbate the effects of banking industry consolidation on all consumers – and particularly the most vulnerable low-and-moderate-income (LMI) communities. Instead, the Division should use this opportunity to strengthen the guidelines to protect consumers and the economy.

Bank mergers and acquisitions are currently reviewed and approved by the Division in conjunction with the appropriate federal banking agency, based on the primary regulator of the new institution created by the merger.[4] [5] But the current approach to bank merger review has

[1] Department of Justice, "Antitrust Division Seeks Public Comments on Updating Bank Merger Review Analysis," press release, September 1, 2020, https://www.justice.gov/opa/pr/antitrust-division-seeks-public-comments-updating-bank-merger-review-analysis.
[2] *Id.*
[3] Federal Reserve Bank of Kansas City, "Bank Consolidation and Merger Activity Following the Crisis," Michal Kowalik, Troy Davig, Charles S. Morris, and Kristen Regehr, 2015, https://www.kansascityfed.org/~/media/files/publicat/econrev/econrevarchive/2015/1q15kowalik-davig-morris-regehr.pdf.
[4] Department of Justice, "Antitrust Division Seeks Public Comments on Updating Bank Merger Review Analysis," press release, September 1, 2020, https://www.justice.gov/opa/pr/antitrust-division-seeks-public-comments-updating-bank-merger-review-analysis.
[5] "The Comptroller of the Currency ("OCC") reviews transactions where the resulting bank is a national or a District of Columbia bank. The Federal Reserve reviews transactions involving bank holding companies and where the resulting bank is a state member. The Federal Deposit Insurance Corporation ("FDIC") reviews transactions where the resulting bank is a state nonmember" Federal Reserve Bank of Kansas City, Understanding Antitrust Considerations in Banking Proposals," https://www.kansascityfed.org/publicat/banking/bankerresources/UnderstandingAntitrusAnalysisv3.pdf.

allowed bank industry consolidation to grow largely unchecked for the past several years, [6] and DOJ has not challenged a bank merger in 35 years.[7]

Last year, I introduced the *Bank Merger Review Modernization Act* with Representative Jesús "Chuy" García to reform the banking agencies' merger review process by imposing additional requirements to ensure that mergers do not undermine financial stability, strengthening the public interest aspect of the review process, and ensuring that merged banks have adequate financial and managerial resources.[8] These reforms are important, and necessary, because the effects of bank mergers go far beyond their immediate impact on market concentration, with wide-ranging implications for financial stability and consumer well-being. However, the Division's merger review and its competitive analysis remain a vital part of the application process complementary to the banking agencies' review. It is incumbent upon the Division to strengthen, not weaken, its merger review process. Specifically, the Division must implement a more robust and comprehensive antitrust analysis and a more transparent, public-facing review.

Lack of Rigor in Antitrust Analysis Process

The Division's current market concentration analysis is entirely inadequate and, in particular, does not sufficiently consider the impact of consolidation on low-income communities. The Division currently analyzes the impact of a proposed transaction on competition within three separate product markets: retail banking products and services, small business products and services, and middle-market banking products and services.[9] While this approach is preferable to that of the banking agencies, which rely on a *cluster market* approach that uses an overly simplistic measure of deposits as a proxy to estimate overall activity in a market,[10] it still lacks the specificity needed to ensure that there is not a reduction in the quantity or availability of banking products used by lower-income households. This reduction can result in increased costs for those services or in nonbank entities filling the gaps by offering similar products without the same regulatory protections for consumers.

Empirical evidence has demonstrated that the Division's approach to reviewing bank mergers has failed to protect consumers and that mergers continue to result in higher costs to

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[6] Federal Deposit Insurance Corporation, "FDIC Statistics at a Glance," June 30, 2020, https://www.fdic.gov/bank/statistical/stats/2020jun/fdic.pdf.

[7] Yale Journal on Regulation, "Modernizing Bank Merger Review," Jeremy C. Kress, Vol. 37:435, 2020, https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1557&context=yjreg.

[8] Office of Senator Elizabeth Warren, "Senator Warren and Representative García Announce Introduction of the Bank Merger Review Modernization Act to End Rubber Stamping of Bank Merger Applications," press release, December 04, 2019, https://www.warren.senate.gov/newsroom/press-releases/senator-warren-and-representative-garca-announce-introduction-of-the-bank-merger-review-modernization-act-to-end-rubber-stamping-of-bank-merger-applications.

[9] Department of Justice, "Antitrust Division Banking Guidelines Review: Public Comments Topics & Issues Guide," https://www.justice.gov/atr/antitrust-division-banking-guidelines-review-public-comments-topics-issues-guide.

[10] Board of Governors of the Federal Reserve System, "FAQs: How do the Federal Reserve and the U.S. Department of Justice, Antitrust Division, analyze the competitive effects of mergers and acquisitions under the Bank Holding Company Act, the Bank Merger Act and the Home Owners Loan Act?", last updated on October 9, 2014, https://www.federalreserve.gov/bankinforeg/competitive-effects-mergers-acquisitions-faqs.htm.

consumers.[11] Bank mergers "tend to inflate the fees that banks charge consumers to maintain deposit accounts and depress the interest rates that banks pay to those accountholders."[12] The 2019 approval of the merger for Branch Banking and Trust Company (BB&T) and SunTrust Bank (SunTrust) revealed the inadequacy of current DOJ merger guidelines. DOJ conditioned this agreement on a pledge that the combined entity divest a total of 28 branches. But even after this divestment, the combined entity, renamed Truist Bank, became the sixth-largest bank in the United States with over $450 billion in assets and over 2,950 branches.[13] As a result of the merger, Truist has already closed 175 branches as of early October and is expected to close up to 800 branches in the coming years.[14] This is just one of the many examples that demonstrate the extent to which the current review process is inadequate.

You are now poised to weaken these guidelines even further, and I am especially concerned that weakening the antitrust calculations used to determine market competitiveness could have a disproportionate impact on unbanked or underbanked communities, and in particular, communities of color. Banking deserts—areas without a physical branch location—have been found to disproportionately harm communities of color, including "25% of all rural closures in majority-minority census tracts," according to a 2017 report by the National Community Reinvestment Coalition.[15] Further, the report found that the "Hispanic population of rural banking deserts is 100% higher than in non-desert tracts; [and] the Native American population is 55% higher."[16]

While innovation in financial services has provided additional convenience and opportunities for many consumers, the declining presence of bank branch locations will have a more severe impact on the LMI communities that are more likely to lack access to the technologies.[17] [18] Indeed, much of the existing commentary surrounding the impact of new developments in financial innovation and mobile banking completely ignores the fact that millions of Americans cannot afford or do not have direct access to mobile phones, computers, or internet access.[19] In

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[11] Yale Journal on Regulation, "Modernizing Bank Merger Review," Jeremy C. Kress, Vol. 37:435, 2020, https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1557&context=yjreg.
[12] *Id.*
[13] Federal Deposit Insurance Corporation, "Order and Basis for Corporation Approval," November 19, 2019, https://www.fdic.gov/news/press-releases/2019/pr19111a.pdf.
[14] S&P Global Market Intelligence, "Majority of BB&T, SunTrust branch closures still to come," Lauren Sullivan, Ali Shayan Sikander, October 5, 2020, https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/majority-of-bb-t-suntrust-branch-closures-still-to-come-60511261.
[15] National Community Reinvestment Coalition, "Bank Branch Closures from 2008-2016: Unequal Impact in America's Heartland," May 2017, https://ncrc.org/wp-content/uploads/2017/05/NCRC_Branch_Deserts_Research_Memo_050517_2.pdf.
[16] *Id.*
[17] Federal Deposit Insurance Corporation, "2017 FDIC National Survey of Unbanked and Underbanked Households," October 2018, https://www.fdic.gov/householdsurvey/2017/2017report.pdf.
[18] Pew Research Center, "Digital divide persists even as lower-income Americans make gains in tech adoption," Monica Anderson and Madhumitha Kumar, May 7, 2019, https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption/.
[19] National Center for Education Statistics, "Number and percentage of households with computer and internet access, by state: 2018," February 2020, https://nces.ed.gov/programs/digest/d19/tables/dt19_702.60.asp?current=yes.

2017, for example, only 28.5 percent of unbanked households reported having home internet access compared to 81.4 percent of fully banked households.[20]

It is imperative that the Division address these inadequacies. Rather than taking actions that would weaken this analysis or allow mergers to pass the screening criteria with looser concentration thresholds than those that currently exist, the Division should instead strengthen these thresholds and use more specific market definitions to ensure that LMI communities are not left without access to banking services. And if the Division's updated guidelines includes online lenders or financial technology companies in the analysis without decreasing the screening thresholds, DOJ cannot ignore the impact of banking consolidation on the communities that do not benefit from these types of financial innovations.

Lack of Transparency in Merger Review Process

Currently, the Division and banking agencies allow and actively encourage banking entities to consult with them, in private, before they submit an official application. [21] [22] The 1995 Bank Merger Competitive Review Guidelines specify: "Parties planning a merger transaction may wish to consult with the relevant banking agency or the Department before submitting an application. Where a proposed merger causes a significant anticompetitive problem, it is often possible to resolve the problem by agreeing to make an appropriate divestiture. In such cases, it may be useful to discuss the matter with the Department and the relevant regulatory agency."[23]

In short, banks that are interested in merging will often "informally" seek input from regulators and DOJ before filing a merger application. During these informal and undisclosed conversations, regulators will conduct a secret and unofficial analysis that is completely hidden from the public, with no opportunity for public input, which is then used to informally alert the banks of any potential areas of concern. This pre-screening of a merger "greases the wheels and creates internal momentum within a regulatory agency. After regulators give a bank the green light to announce an acquisition, the deal becomes difficult to stop."[24]

The new guidelines must be updated so that any discussions between banks involved in mergers and DOJ staff should be made public, including any analyses and research conducted prior to the filing of the official application. Making this process public would not only provide the public with transparency throughout the entire merger application process but would also ensure that

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[20] Federal Deposit Insurance Corporation, "2017 FDIC National Survey of Unbanked and Underbanked Households," October 2018, https://www.fdic.gov/householdsurvey/2017/2017report.pdf.
[21] United States Department of Justice, "Bank Merger Competitive Review -- Introduction and Overview (1995)", last updated August 26, 2020, https://www.justice.gov/atr/bank-merger-competitive-review-introduction-and-overview-1995.
[22] Yale Journal on Regulation, "Modernizing Bank Merger Review," Jeremy C. Kress, Vol. 37:435, 2020, https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1557&context=yjreg.
[23] United States Department of Justice, "Bank Merger Competitive Review -- Introduction and Overview (1995)", last updated August 26, 2020, https://www.justice.gov/atr/bank-merger-competitive-review-introduction-and-overview-1995.
[24] Yale Journal on Regulation, "Modernizing Bank Merger Review," Jeremy C. Kress, Vol. 37:435, 2020, https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1557&context=yjreg.

regulators and DOJ do not use the statutorily required merger review process as a formality to achieve a pre-determined outcome.

Additionally, there is a need for greater transparency into the competitive analysis itself. To the extent this analysis relies on non-confidential data, it should be published in full to allow the public, and, in particular, the communities most affected by the merger transaction, to fully review and understand why certain divestitures are or are not required. When the products from certain categories of institutions, such as credit unions, are given different weights, the considerations underlying those decisions should be clearly identified along with an explanation as to why those weights are appropriate. This change will help ensure a fair, open, and effective review process.

As DOJ considers changing its merger review guidelines, it is essential that the impact of bank mergers on underserved communities remain at the forefront of the discussion, and any changes that would result in further consolidation of the banking industry should be dismissed.

Thank you for your attention to this important matter.

Sincerely,

Elizabeth Warren
United States Senator