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via electronic submission

February 15, 2022

Mr. Jonathan Kanter
Assistant Attorney General for the Antitrust Division
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

RE: REQUEST FOR PUBLIC COMMENTS ON BANK MERGER COMPETITIVE ANALYSIS

Dear Assistant Attorney General Kanter,

The Independent Community Bankers of America (“ICBA”)¹ appreciates the opportunity to offer comments in response to the Department of Justice’s (“the Department”) most recent request for public comments on bank merger competitive analysis and possible revisions to the Department’s 1995 Banking Guidelines (“the Guidelines”).

The purpose of the Guidelines is to ensure compliance with Section 7 of the Clayton Act (“the Act”) and limit both market concentration and the formation of monopolies.² However, the Department’s bank merger competitive analysis often produces contradictory outcomes that are inconsistent with the spirit of the Act and prevent small community banks, especially those located in sparsely populated markets, from merging with one another to better compete with larger market participants. The Department’s current framework antithetically authorizes megamergers among large banks and reinforces marketplace concentration among a few financial institutions that are “too big to fail,” while prohibiting mergers among the smallest community banks serving rural America and Main Street.

¹ The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With nearly 50,000 locations nationwide, community banks constitute roughly 99 percent of all banks, employ nearly 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding nearly \$5.9 trillion in assets, over \$4.9 trillion in deposits, and more than \$3.5 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers’ dreams in communities throughout America. For more information, visit ICBA’s website at www.icba.org.

² Section 7 of the Clayton Act prohibits mergers if “in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly.” 15 U.S.C. § 18.

Additionally, the methodology the Department uses to evaluate market concentration is inherently concentrated, as it fails to give adequate weight to non-bank and non-traditional bank competitors such as credit unions, online banks, fintech companies, and Farm Credit System associations. While the financial services landscape has evolved drastically in the past thirty years, the Department's bank merger competitive analysis remains archaically tethered to the measurement of deposit gathering activities at physical bank locations. The Department's Guidelines should comprehensively account for all market participants that directly compete with community banks by evaluating lending activity in addition to deposit taking.

I. ICBA RECOMMENDATIONS

Revisions to the Guidelines are necessary to ensure the Department's bank merger analysis (1) provides an even and competitive playing field among all market participants, including banks of all sizes, credit unions, non-bank financial technology companies, and farm credit associations; (2) prohibits the largest financial institutions from becoming monopolies that are "too-big-to-fail"; and (3) presumptively permits mergers among small community banks where moderate and responsible growth will ensure a continued community bank presence that best serves local communities, including rural and low-and-moderate-income ("LMI") communities.

To accomplish these goals, ICBA encourages the Department to adopt the following recommendations:

- Create a small bank *de minimis* exception whereby the Department "would automatically provide a report on the competitive factors of the transaction to the responsible banking agency but would not conduct an independent competitive effects analysis of these deals."³
- Apply a small bank *de minimis* exception to all proposed mergers where both the acquiring and acquired bank have \$1 billion or less in assets, or in the alternative, have \$600 million or less in assets and are therefore "small businesses" as defined by the Small Business Administration ("SBA") Small Business Size Standards.⁴
- For acquiring or acquired banks with \$100 billion or more in assets, consult with the prudential regulators to determine whether the benefits of the merger outweigh the risk the combined institution will pose systemic risk or be "too big to fail."
- Include credit unions, a significant source of community bank competition, as "other institutions" in the Herfindahl-Hirschman Index ("HHI") calculations for Screen A and Screen B and ensure credit unions are assigned a 100% weighting as bank competitors.
- Scrutinize credit union acquisitions of community banks, and in particular, evaluate whether credit unions that acquire community banks will fully meet the convenience and needs of the

³ Department of Justice, "Antitrust Division Banking Guidelines Review: Public Comments, Topics & Issues Guide" (Sept. 1, 2020).

⁴ U.S. Small Business Administration "Table of Small Business Size Standards Matched to North American Industry Classification System Codes" (Aug. 19, 2019), available at: <https://www.ecfr.gov/current/title-13/chapter-I/part-121#121.201>.

community when the combined entity is no longer subject to the Community Reinvestment Act (“CRA”).

- Revise the Guidelines to ensure the data used to measure overall banking activity in a market includes fintech companies, large banks that lend nationwide without geographic limitations, and online lenders that compete with community banks despite lacking a physical presence in any single geographic region or locality.
- Ensure the Department’s framework for measuring concentration accounts for lending activity since fintech companies, large national banks, online banks and farm credit agencies compete with community banks but may not accept deposits or report deposits to the Federal Deposit Insurance Corporation (“FDIC”) in the same manner as community banks.
- Provide identical treatment for farm credit agency loans in rural markets and agricultural loans made by other commercial banks.

II. **SMALL BANK DE MINIMIS EXCEPTION**

Unless the Department increases deposit-based concentration thresholds from the 1800/200 HHI level, a small bank *de minimis* exception is necessary to ensure artificially high HHI thresholds in rural markets do not prohibit otherwise permissible and competitive mergers among community banks. Because many community banks operate in sparsely populated geographic areas that are considered “highly concentrated” under the Department’s current HHI thresholds, the Department improperly views combinations among small community banks that serve similar rural or underserved markets as monopolistic.⁵ As a result, community banks that need to combine with other local competitors due to generational ownership changes or to achieve necessary economies of scale, reduce costs through operational efficiencies, diversify business lines, or expand geographic reach are forced to either merge with larger out-of-market institutions that are not as familiar with the community or be acquired by tax-exempt credit unions; outcomes that are not in the best interests of community bank customers that depend on, and would likely prefer, a continued local community bank branch and relationship presence.

The Department can prevent these harmful outcomes, and in so doing preserve the long-term viability of many community banks, by implementing a small bank *de minimis* exception as described in the Department’s September 1, 2020 request for public comment on bank merger guidelines.⁶ ICBA strongly urges the Department to codify a proposed small bank *de minimis* exception and automatically provide a report on the competitive factors of the small bank transaction to the responsible banking

⁵ The Department considers any merger that results in the market’s HHI exceeding 1,800 to be a “highly concentrated” market. According to a recent study performed by a senior economist at the Federal Reserve Bank of St. Louis, almost 89 percent of rural banking markets were “highly concentrated,” and therefore uncompetitive under the Department’s framework. Andrew P. Meyer, “Market Concentration and Its Impact on Community Banks,” (April 12, 2018) available at: <https://www.stlouisfed.org/publications/regional-economist/first-quarter-2018/concentration-community-banks>.

⁶ Department of Justice, “Antitrust Division Banking Guidelines Review: Public Comments, Topics & Issues Guide” (Sept. 1, 2020).

agency without the Department performing its own independent competitive effects analysis of these deals.⁷

ICBA recommends the Department apply a small bank *de minimis* exception to those mergers where both the acquiring and acquired bank have \$1 billion or less in assets, or in the alternative, \$600 million or less in assets and are therefore “small businesses” as defined by the Small Business Administration (“SBA”) Small Business Size Standards.⁸ A small bank *de minimis* exception will presumptively allow small community banks to enjoy moderate and responsible growth through merger activities, and achieve economies of scale that will result in more efficient banks, a sounder banking system, and benefit the economy.⁹

The Department should create a small bank *de minimis* exception to bolster competition and preserve the community bank model because small banks excel at serving the credit needs of local businesses.¹⁰ As evidenced by data compiled by the Bureau of Labor Statistics and Small Business Administration, during the recent COVID-19 pandemic, community banks outperformed the rest of the financial services industry in meeting the needs of small businesses and underserved communities.¹¹ Community banks made 60 percent of all Paycheck Protection Program (“PPP”) loans – including 72 percent of PPP loans to minority businesses.¹² Community banks accounted for 67 percent of PPP loans to industries with average hourly earnings of \$10 to \$20 per hour and provided more than 90 percent of PPP loans to communities with an average household income of less than \$40,000 per year.¹³

Community banks were also the predominant lenders within rural and suburban communities, and provided more than 75 percent of PPP loans to communities with a poverty rate of at least 20 percent

⁷ Department of Justice, “Antitrust Division Banking Guidelines Review: Public Comments, Topics & Issues Guide” (Sept. 1, 2020).

⁸ U.S. Small Business Administration “Table of Small Business Size Standards Matched to North American Industry Classification System Codes” (Aug. 19, 2019), available at: <https://www.ecfr.gov/current/title-13/chapter-I/part-121#121.201>.

⁹ According to research conducted by the Federal Reserve, smaller banks benefit from economies of scale. See David C. Wheelock and Paul W. Wilson, “Do Large Banks Have Lower Costs? New Estimates of Returns to Scale for U.S. Banks,” Working Paper 2009-054E, Federal Reserve Bank of St. Louis (May 2011) and Gregory Elliehausen, “The Cost of Banking Regulation: A Review of the Evidence,” Staff Study 171, Federal Reserve (Washington, D.C.: April 1998).

¹⁰ See Allen N. Berger et al., *Does Function Follow Organizational Form? Evidence from the Lending Practices of Large and Small Banks*, 76 J. FIN. ECON. 237, 266 (2005).

¹¹ See Noah Yosif, *Paycheck Protection Program Data Show Community Banks Served Those Most in Need*, available at: <https://www.icba.org/newsroom/blogs/main-street-matters/2021/11/10/paycheck-protection-program-data-show-community-banks-served-those-most-in-need>.

¹² *Id.*

¹³ *Id.*

and long-term unemployment above 10 percent.¹⁴ In light of the important services community banks provide to rural and underserved markets, and because no individual community bank holds enough nationwide market share to pose systemic risk or be considered a monopoly, the Department's bank merger competitive analysis should exempt small banks from the rigorous framework it applies to institutions that control billions and trillions of assets.

III. TOO BIG TO FAIL

A small number of banks have grown so exponentially large that they pose a critical threat to the economy and the taxpayer, thwart the free market and stifle competition. The 15 largest U.S. banks dwarf the rest of the banking system and hold \$13.38 trillion in assets, with the smallest institution in this group holding \$199 billion in total assets.¹⁵ The 5 largest U.S. banks control more than 40% of the entire banking industry's total assets, leaving the remaining market share to be divided by thousands of banks.¹⁶ Survey evidence even suggests that 38% of Americans have primary banking relationships with only 3 of these banks: Bank of America, Wells Fargo, and J.P. Morgan Chase.¹⁷ This tremendous concentration of banking assets among so few institutions distorts the markets, creates unfair competitive advantages for the largest banks, and contravenes the public interest.

The Department's bank merger competitive framework has not prevented big banks from growing bigger. In fact, the opposite is true. In the past 3 years, 4 of the largest U.S. banks have secured merger approval from the Department, and several others have announced their plans to merge.¹⁸ While mergers among the largest banks may technically comply with the government's concentration limits, these combinations produce some anticompetitive effects that are not measured by the Department's calculations.¹⁹ Specifically, when the largest banks in the nation merge, these deals exacerbate industry consolidation by creating downstream pressures for other smaller institutions to grow larger to compete.

¹⁴ *Id.*

¹⁵ FDIC QBP Third Quarter 2021 Volume 15 Number 4 (Sept. 30, 2021) available at: <https://www.fdic.gov/analysis/quarterly-banking-profile/qbp/2021sep/qbp.pdf#page=1>

¹⁶ *Id.*

¹⁷ Shannon Green "What banking monopoly?" *Fortune* (Sept. 24, 2013) available at: <https://fortune.com/2013/09/24/what-banking-monopoly/>.

¹⁸ See Order Approving the Merger of Bank Holding Companies, BB&T Corporation Winston-Salem, North Carolina ([federalreserve.gov](https://www.federalreserve.gov)); Order Approving the Acquisition of a Bank Holding Company -- The PNC Financial Services Group, Inc. ([federalreserve.gov](https://www.federalreserve.gov)); Citizens Financial Group, Inc. to Acquire HSBC East Coast Branches and National Online Deposit Business; U.S. Bancorp to Acquire MUFG Union Bank ([usbank.com](https://www.usbank.com)).

¹⁹ As emphasized in ICBA's comments to the Department's September, 2020 request for information, ICBA strongly supports the Riegle-Neal Interstate Banking and Branching Efficiency Act's nationwide and statewide deposit caps, as well as Section 622 of the Dodd-Frank Wall Street Reform and Consumer Protection Act's concentration limits on total consolidated liabilities. However, as evidenced by the numerous recent large bank mergers cited above, these concentration limits still permit mergers among the nation's largest banks to occur.

To better ensure the Department’s antitrust reviews of large bank mergers are sufficiently rigorous, the Department should add a requirement to its Guidelines that for acquiring or acquired banks with \$100 billion or more in assets, the Department will consult with the prudential regulators to determine whether the benefits of the merger outweigh the risks the combined institution will pose systemic risks to the financial system or be “too big to fail.”

IV. CREDIT UNION COMPETITION

Credit unions are a significant source of competition for community banks, particularly in rural markets. Yet credit unions are not considered full competitors to banks when conducting bank merger analysis because the Department relies on outdated federal laws and regulations that differentiate credit unions from banks on the basis of credit unions’ field of membership restrictions and hard caps on member business lending. Since the Department last revised its guidelines, the National Credit Union Administration (“NCUA”) has significantly relaxed credit union membership restrictions and limits on member business lending and there is no longer a meaningful or practicable difference between credit unions and community banks that justifies excluding credit unions from the Department’s competitive analysis.

For example, credit unions designated as “low-income” credit unions do not face restrictions on member business lending, making them much more significant competitors to community banks in the small business lending market than traditional credit unions.²⁰ Additionally, while federal law limits credit unions with a community charter to serving “[p]ersons or organizations within a well-defined local community, neighborhood, or rural district,”²¹ a “well-defined local community, neighborhood, or rural district” can, in practice, span several counties or states or consist of an entire metropolitan statistical area.²² Consequently, so-called “community credit unions” are able to serve all potential customers in an area equivalent to or larger than their entire market.

In an ICBA survey of 186 community banks, bankers were asked to rate the level of competition they faced from large banks, other community banks, credit unions, and the Farm Credit System from 1 to 5 (with 5 being the most competitive). 44.8% of community bankers rated credit unions a 4 or a 5 in competitiveness and 75.9% rated credit unions a 3 or above. In terms of average competitiveness, community banks rate credit unions as more significant sources of competition than either large banks or the Farm Credit System. Additionally, a report by the Conference of State Bank Supervisors found

²⁰ Traditionally, credit unions have been subject to a 12.25% member business loan (MBL) cap – meaning that no more than 12.25% of their assets can be loans to member-owned businesses. However, credit unions certified as low-income credit unions, meaning that a majority of the credit union’s membership (50.01 percent) meets certain low-income thresholds, are exempted from the MBL cap. See 12 U.S.C. 1757a(b). In addition, numerous business loans made by credit unions are not counted toward the cap, e.g., loans of \$50,000 or less or loans guaranteed by SBA. See 12 CFR 723.2. See also 12 CFR 723.1(c)(2).

²¹ 12 U.S.C. 1759(b)(3).

²² NCUA Chartering and Field of Membership Manual, 12 C.F.R Appx. B to Pt. 701, V.A.2.

that “credit unions were named by between 14% and 20% of bankers as a dominant primary or secondary source of competition for [both transaction and non-transaction deposits].”²³

Empirical research confirms bankers’ concerns that credit unions are unfairly competing with community banks. For example, a Federal Reserve Bank of St. Louis study from 2000 concluded “*commercial banks and credit unions are direct competitors* in the local household deposit market.”²⁴ This study, which analyzed data from 1,062 counties over a period of 7 years, found that in markets where banking became more concentrated, for example as a result of a bank merger, credit union participation increased during the subsequent year and that “an increase in the rate of participation at credit unions in a given year will cause more concentration in the commercial-banking market of the respective county during the next year.”²⁵ These results quantitatively demonstrate that customers, and credit unions themselves, view banks and credit unions as close substitutes for deposit accounts.

Empirical research also confirms credit unions actively compete to attract bank depositors as customers for credit union loan products. For example, a 2001 study of the competitive role of credit unions in small markets concluded “new vehicle loan rates offered by banks in relatively small consumer lending markets are affected in a significant manner ... by the share of credit unions in those markets.”²⁶ In other words, where credit unions were present in a market, banks were required to adjust their auto lending rates to respond to increased competition. Based on anecdotal feedback from bankers, this competitive pressure extends to the markets for every loan product credit unions offer. This significant level of competition is evidence that it is appropriate to include credit unions in the market definition when assessing the competitive effect of bank mergers.

In the past, it may have made sense to exclude credit unions from the market definition when examining bank mergers – but no longer. Credit unions’ tax-exempt status and the relaxation of field of membership restrictions has transformed the credit union industry from a niche player into a fully-fledged rival to commercial banks. According to statistics from the Credit Union National Association, in 1995 credit unions nationwide had 68,522,495 members and held assets of \$312.9 billion. As of 2021, credit unions have nearly doubled in size to 128,580,679 members and have grown their size nearly six-fold to \$1.9994 trillion of assets, growth of 87.65% and 539% respectively.²⁷

²³ Conference of State Bank Supervisors (CSBS), “Community Banking in the 21st Century 2021” (Sept. 28, 2021), available at: https://www.communitybanking.org/~media/files/publication/cb21publication_2021.pdf.

²⁴ William R. Emmons and Frank A. Schmid, “Bank Competition and Concentration: Do Credit Unions Matter?,” *Federal Reserve Bank of St. Louis Review*, (May/June 2000), p. 29-42, available at: <https://files.stlouisfed.org/files/htdocs/publications/review/00/05/05we.pdf>. (emphasis added).

²⁵ *Id.* at 39.

²⁶ Feinberg, R. M. (2001), “The Competitive Role of Credit Unions in Small Local Financial Services Markets,” *The Review of Economics and Statistics*, 83(3), 560–563, available at: <http://www.jstor.org/stable/3211556>.

²⁷ See Credit Union National Association, Credit Union and Economics Data, “Credit Union Trends by Asset Size,” (accessed on 1/18/2022), available at: <https://www.cuna.org/advocacy/credit-union---economic-data/data---statistics.html>.

Currently, the Department’s merger guidelines only consider “evidence that a credit union has such membership restrictions, or lack of restrictions, and offers such services to commercial customers that it should be considered to be in the market” after Screen A or B of the guidelines highlight a proposed merger as requiring further review.²⁸ This calculation does not accurately reflect the current competitive realities that community banks face from credit unions, and it reinforces fictitious differences between credit unions and community banks that further concentrate the community banking industry. Instead, it is appropriate to consider credit union competition in the same manner as competition from other commercial banks – specifically by including them as “other institutions” when calculating HHI for Screens A and B, to account for credit unions’ lending volume within community bank markets.

V. CREDIT UNION ACQUISITIONS OF COMMUNITY BANKS

Because the Department’s current merger guidelines often prohibit in-market community bank mergers, community banks that need to merge, especially due to generational changes in ownership, are increasingly selling their institutions to credit unions as acquirers of last resort. When state banking codes were drafted, legislators did not contemplate the possibility of banks being acquired by credit unions and few explicitly permit mergers between banks and credit unions. For this reason, credit unions will structure their acquisition of community banks as purchase and assumption (P&A) transactions, where the credit union buys all the assets (loans) of a community bank and assumes all its liabilities (deposits) in order to circumvent legal prohibitions against credit union-bank mergers. Since 2003, 102 community banks have been acquired by credit unions using this tactic, and ICBA expects this trend to continue if state and federal regulators do not more rigorously scrutinize and prohibit these deals.

ICBA strongly opposes these deals as a matter of public policy. This unorthodox acquisition structure is designed to circumvent traditional merger review and/or legal prohibitions of bank-credit union mergers. Some states, including Iowa, Colorado, and Tennessee, have fought back. In Iowa, the state’s Superintendent of Banking has publicly stated credit union purchases of community banks are contrary to state law and has vowed to “quickly deny” any future proposed acquisitions.²⁹ In Colorado, the state’s banking board voted against a bid by Elevations Credit Union to purchase the assets of Cache Bank & Trust.³⁰ Likewise, in Tennessee, the Tennessee Department of Financial Institutions argued that Orion Federal Credit Union’s proposed acquisition of Financial Federal Bank violated state law. A state court, agreeing with the regulator, issued an injunction to temporarily stop the deal.³¹

²⁸ United States Department of Justice, Antitrust Division, “Bank Merger Competitive Review – Introduction and Overview” (1995), available at: [Bank Merger Competitive Review -- Introduction And Overview \(1995\) \(justice.gov\)](#).

²⁹ Frank Gargano and Ken McCarthy, “Why an Iowa credit union is venturing out of state to buy banks,” *American Banker* (Oct. 28, 2021), available at: <https://www.americanbanker.com/creditunions/news/why-an-iowa-credit-union-is-venturing-out-of-state-to-buy-banks>.

³⁰ Aaron Passman, “State regulators block credit union’s bank purchase,” *American Banker* (Jan. 16, 2020), available at: <https://www.americanbanker.com/creditunions/news/state-regulators-block-credit-unions-bank-purchase>.

³¹ Peter Stozniak, “Credit Union Purchase of Tennessee Bank Temporarily Blocked by Judge,” *Credit Union Times* (Nov. 18, 2021), available at: <https://www.cutimes.com/2021/11/18/credit-union-purchase-of-tennessee-bank-temporarily-blocked-by-judge/>.

Credit union acquisitions of community banks have adverse effects on historically disadvantaged or underserved communities. In a letter responding to the Department’s 2020 request for comments, Senator Elizabeth Warren urged the Department to update its merger review process to “ensure that LMI communities are not left without access to banking services.”³² We agree with Senator Warren that the impact of consolidation on LMI communities is an important concern. However, this impact is not limited to branch divestitures, but it also extends to the level of lending to LMI customers and small businesses that is expected of financial institutions post-merger. Allowing credit unions to acquire community banks without ensuring the combined institution is required to serve LMI customers will lead to reduced levels of community reinvestment.

Unlike community banks, credit unions are completely exempt from the Community Reinvestment Act (“CRA”) and its mandate that banks serve their entire communities – including meeting the credits needs of LMI borrowers. When a credit union acquires a community bank, the combined institution is no longer subject to the CRA, and no longer statutorily required to meet the needs of LMI borrowers. Given the increasing number of credit union acquisitions of community banks and the reduced number of institutions subject to the CRA, the Department should be seriously concerned that its anti-trust guidelines are operating to block community bank mergers that, if permitted, would ensure banks subject to the CRA are maintained in local communities. The Department should ensure its guidelines properly account for credit unions as market participants, and that its guidelines do not unfairly block mergers among small community banks that would remain subject to the CRA if permitted to merge.

Finally, credit union acquisitions of banks are also harmful to taxpayers because they grossly reduce tax-income. Each time a credit union purchases a community bank, it converts a taxpaying institution into one that is federally tax-exempt, thus eliminating the tax income the community bank formerly paid to the government. The tax-advantaged status of credit unions allows them to pay significant premiums for community banks, with some deals reaching premiums as high as 184% of tangible book value. ICBA estimates credit union acquisitions of community banks amount to a loss of roughly \$300 million annually in federal income taxes alone. The credit union tax exemption for the \$2 trillion industry costs taxpayers \$2 billion per year and is rising at the federal level.³³ Acquisitions of community banks by credit unions are often simply a form of tax arbitrage that do not promote market competition or consumer welfare. As a result, they should be prohibited as a matter of public policy, and the Department should revise its bank merger guidelines to ensure its policies permit community bank mergers as a better alternative to credit union acquisitions of community banks.

³² Senator Elizabeth Warren, “Comment Letter to DOJ on Bank Merger Review Process” (Oct. 16, 2020), available at: <https://www.warren.senate.gov/imo/media/doc/2020.10.16%20Comment%20Letter%20to%20DOJ%20on%20Bank%20Merger%20Review%20Process.pdf>.

³³ Robert Fisher, “Credit union acquisition milestone demands Washington response,” *Business Observer* (Sep. 15, 2021), available at: <https://www.businessobserverfl.com/article/credit-union-acquisition-milestone-demands-washington-response>.

VI. ONLINE LENDERS

Since the Department's Guidelines were finalized in 1995, technological innovation and consumer preferences for mobile and online banking services have caused a paradigm shift in bank deposit gathering and lending activities. Banks and their consumers increasingly use digital services such as remote deposit capture, online account opening, and cashless payments. According to a 2019 FDIC survey that explored household use of banking and financial services, 56.8 percent of households reported using online and mobile banking as the primary methods used to access bank accounts.³⁴ Because of the proliferation of online banking products and services in recent years, community banks directly compete with online-only banks that lack branch networks, as well as neo-bank fintech companies that partner with traditional banks to offer deposits, credits, loans and other banking services. As online lenders continue to penetrate the geographic markets community banks serve, the competition between community banks, online lenders, fintechs, and neo-banks will further intensify.

Given the significant competition online banks and neo-banks pose to traditional community banks, the Department's bank merger analysis should fully measure this competition when evaluating concentration concerns in geographic markets. Remarkably, however, despite online lenders engaging in banking activities in virtually every local market in the United States and directly competing with community banks for market share, the competitive influence of online lenders' bank activities is distorted because the Department does not measure the availability of banking services generally, including lending and deposit activity in a market, and instead uses branch deposit data as a proxy for measuring competition.

Deposit data is an outdated and flawed proxy for bank competition because it does not appropriately measure the deposits of online banks that, by definition, do not have a physical presence and can gather deposits from and make credit available to consumers without geographic restrictions. Because online banks do not operate physical branches in any of the local markets they serve, these institutions can select the location of their headquarters and/or main offices as "branches" for purposes of reporting their deposits to the FDIC. Therefore, even if an online bank services a multitude of local markets besides the local market(s) in which their "branches" are located, the online bank will only book deposits in select market(s). As such, the deposit data the Department reviews in its bank merger competitive analysis is heavily skewed as the data understates deposits in the local markets the online bank actually serves and overstates the deposits in the local market(s) the bank chooses to report. Since deposit data does not accurately reflect the totality of the geographic markets where online banks operate and compete, the Department should instead measure concentration by evaluating lending activity as well as deposit taking.

VII. FARM CREDIT SYSTEM

ICBA encourages the Department to provide identical treatment for loans made by farm credit associations and agricultural loans made by commercial banks. The Department currently only evaluates lending from farm credit associations within the Farm Credit System ("FCS") as a "mitigating factor" in its competitive analysis even though farm credit associations are the primary competitor of

³⁴ FDIC 2019 Survey Report "How America Banks: Household Use of Banking and Financial Services" available at: <https://www.fdic.gov/analysis/household-survey/2019report.pdf>.

community banks in rural markets.³⁵ According to USDA statistics, the FCS provides 22.45 percent more credit to the agricultural sector than the banking sector (\$195.5 billion versus \$159.9 billion), making competition from FCS lending more significant than “a mitigating factor.” In a survey of 186 community bankers, 54.1 percent reported losing loans to the Farm Credit System, suggesting consumers view FCS lenders as “close substitutes” to community banks.

The FCS has expanded its market share in recent years due to their tax and funding advantages as a government sponsored enterprise (“GSE”), and in fact the only GSE that competes directly against tax paying community banks in commercial lending markets. FCS lenders pay no taxes on their commercial real estate lending, the main reason the FCS has rapidly gained market share over the commercial banking sector in recent years, an advantage particularly damaging to community banks. When the Department’s Guidelines were finalized in 1995, FCS loan volume was only \$41 billion, whereas today the FCS loan volume is \$323 billion.³⁶ The high volume of lending that FCS conducts today should warrant identical treatment between loans made by farm credit associations and agricultural loans made by commercial banks.

VIII. CONCLUSION

Once again, ICBA appreciates this opportunity to provide comments to the Department, and we encourage the Department to modernize its Guidelines to better reflect the availability of products and services in any geographic market and the lending activities performed by the many “close substitute” competitors to community banks operating in today’s financial services landscape. Additionally, we encourage the Department to work closely with the federal bank regulators in evaluating possible changes to the bank merger competitive analysis framework. A harmonized approach to modernizing this framework among all the agencies responsible for evaluating bank mergers can best be accomplished through interagency notice-and-comment rulemaking. Please feel free to contact Jenna Burke at jenna.burke@icba.org or Mickey Marshall at michael.marshall@icba.org should you wish to discuss our positions in further detail.

Sincerely,

/s/ Jenna Burke
Senior Vice President, Senior Regulatory Counsel

/s/ Mickey Marshall
Director, Regulatory Legal Affairs

³⁵ “[I]n rural markets where agriculture is a primary business activity, the Farm Credit System’s retail lenders, known as Farm Credit Associations ... are particularly important nonbank competitors.” Charles S. Morris et al., *Competition in Local Agricultural Lending Markets: The Effect of the Farm Credit System*, FED. RES. BANK OF KANSAS CITY ECON. REV. 51-52 (4th Quarter 2015).

³⁶ See Farm Credit Administration, Quarterly Report Risk Analysis of Farm Credit System Operations, Second Quarter 1997 available at: <https://www.fca.gov/template-fca/download/ReportArchives/FCAQuarterlyReportJune1997.pdf>. See also 2020 Annual Report of the Farm Credit Administration Regulator of the Farm Credit System available at: <https://www.fca.gov/template-fca/about/2020AnnualReport.pdf>.