

June 27, 2023

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

The Honorable Michael Barr
Vice Chair for Supervision
Board of Governors of the Federal Reserve
System
20th Street and Constitution Avenue NW
Washington, DC 20551

The Honorable Martin J. Gruenberg
Chair
Federal Deposit Investment Corporation
550 17th St. NW
Washington, DC 20429

The Honorable Janet Yellen
Secretary of the Treasury
U.S. Department of Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

Mr. Michael Hsu
Acting Comptroller of the Currency
Office of the Comptroller of the Currency
400 7th St. SW
Washington, DC 20219

Dear Assistant Attorney General Kanter, Chairman Gruenberg, Acting Comptroller Hsu, Vice Chair Barr, and Secretary Yellen:

I am writing today, in the wake of three of the largest bank collapses in U.S. history,¹ to urge you to promote greater competition in the banking sector and strengthen your bank merger review guidelines. Earlier this year, a series of fatal errors – poor risk management by bank executives, corporate greed, deregulation, and the lack of sufficient federal supervision – led to the implosion of Silicon Valley Bank,² which was shortly followed by the collapses of Signature Bank and First Republic.³ Unfortunately, Secretary Yellen and Acting Comptroller Hsu have recently indicated that they appear to be taking the wrong lessons from these bank failures, suggesting that they would like to see more bank consolidation.⁴ This would represent exactly the wrong approach.

¹ Washington Post, “Three of the four largest-ever bank failures have happened since March,” Luis Melgar and Hamza Shaban, May 1, 2023, <https://www.washingtonpost.com/business/2023/03/13/bank-failure-size-svb-signature/>.

² Fortune, “Silicon Valley Bank collapsed because its managers were terrible and regulators dropped the ball, according to a new Fed report,” Christopher Rugaber and Ken Sweet, April 28, 2023, <https://fortune.com/2023/04/28/silicon-valley-bank-collapse-fed-report-management-lax-regulation/>.

³ New York Times, “3 Failed Banks This Year Were Bigger Than 25 That Crumbled in 2008,” Karl Russell and Christine Zhang, May 1, 2023, <https://www.nytimes.com/interactive/2023/business/bank-failures-svb-first-republic-signature.html>.

⁴ CNN, “Yellen told bank CEOs more mergers may be necessary, sources say,” Matt Egan, May 19, 2023, <https://www.cnn.com/2023/05/19/investing/janet-yellen-bank-mergers/index.html>.

Under federal law, the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), and the Federal Reserve (Fed) are charged with reviewing and approving mergers and acquisitions among the banks they oversee, in conjunction with the Department of Justice (DOJ).⁵ While your agencies are working to update the guidelines under which you evaluate bank mergers, which were last published in 1995,⁶ the recent bank crisis underscores the urgency of strengthening the merger review process and reversing the dangerous trend of bank consolidation. I have a series of questions about how you intend to do so.

I have long been concerned with bank concentration and your agencies' failures to curb the proliferation of banks that are "too-big-to-fail."⁷ Since 2006, the Fed has approved more than 3,500 consecutive bank merger applications without denying a single one.⁸ In fact, less than two years before Silicon Valley Bank failed, the Fed approved its acquisition of Boston Private Bank and Trust following its determination – which we now know could not have been more wrong – that the merged bank would not “pose significant risk to the financial system in the event of financial distress.”⁹ Not a single one of the federal banking agencies have formally denied a bank merger application in over 15 years, while DOJ has not challenged a bank merger in more than 35 years.¹⁰ Meanwhile, the number of commercial banks in the U.S. has fallen by 70% over the past two decades, and the trend is accelerating with \$77 billion in bank mergers and acquisitions in 2021 alone – the “highest yearly deal volume since the 2008 financial crisis.”¹¹

⁵ Bank Merger Act of 1960, Pub. L. No. 86-463, 74 Stat. 129; Bank Holding Company Act of 1956, Pub. L. No. 84-511, 70 Stat. 133; Federal Deposit Insurance Act of 1960, Pub. L. No. 86-463, 74 Stat. 129.

⁶ Department of Justice, press release, “Assistant Attorney General Jonathan Kanter Delivers Keynote Address at the Brookings Institution’s Center on Regulation and Markets Event ‘Promoting Competition in Banking,’” June 20, 2023, https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-address-brookings-institution#_ftn2.

⁷ Letter from Senator Elizabeth Warren to Federal Reserve Chairman Jerome Powell and Attorney General Jeff Sessions, April 20, 2018,

<https://www.warren.senate.gov/imo/media/doc/2018.04.20%20Letter%20to%20Powell%20and%20Sessions%20re%20Banking%20bill%20antitrust.pdf>; Letter from Senator Elizabeth Warren to Assistant Attorney General Makan Delrahim, October 16, 2020,

<https://www.warren.senate.gov/imo/media/doc/2020.10.16%20Comment%20Letter%20to%20DOJ%20on%20Bank%20Merger%20Review%20Process.pdf>; Letter from Senator Elizabeth Warren to FDIC Chair Martin Gruenberg and Acting Comptroller of the Currency Michael Hsu, May 17, 2023,

[https://www.warren.senate.gov/imo/media/doc/2023.05.17%20Letter%20to%20FDIC%20and%20OCC%20re%20Fir](https://www.warren.senate.gov/imo/media/doc/2023.05.17%20Letter%20to%20FDIC%20and%20OCC%20re%20First%20Republic%20JPMorgan%20Deal.pdf)
[st%20Republic%20JPMorgan%20Deal.pdf](https://www.warren.senate.gov/imo/media/doc/2023.05.17%20Letter%20to%20FDIC%20and%20OCC%20re%20Fir).

⁸ The Conversation, “Biden wants to crack down on bank mergers – here’s why that could help consumers and the economy,” Jeremy Kness, July 27, 2021, <https://theconversation.com/biden-wants-to-crack-down-on-bank-mergers-heres-why-that-could-help-consumers-and-the-economy-164689>.

⁹ Federal Reserve Board, “Order Approving the Merger of Bank Holding Companies, the Merger of Banks, and the Establishment of Branches,” FRB Order No. 2021-08, June 10, 2021,

<https://www.federalreserve.gov/newsevents/pressreleases/files/orders20210610a1.pdf>.

¹⁰ 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>.

¹¹ *Id.*; The Hill, “Janet Yellen is wrong about bank mergers, and we could all pay the price,” Shahid Naem, May 18, 2023, <https://thehill.com/opinion/finance/4007341-janet-yellen-is-wrong-about-bank-mergers-and-we-could-all-pay-the-price/>.

This consolidation hurts consumers. Consolidation causes “higher prices and more fees, lower deposit rates, less access to credit, bank branch closures, and job cuts.”¹² In addition to harming consumers and small businesses, bank consolidation poses increases systemic risk in the financial system, reducing the number of smaller banks and creating even more too big to fail banks.¹³ Enhancing the dominance of these big banks, which enjoy financial benefits simply because of the “too-big-to-fail subsidy ... the perception among other market participants that they will receive government bailouts ... creat[es] competitive distortions that disadvantage smaller firms, degrade competition, and artificially encourage further consolidation and concentration in the financial system.”¹⁴

President Biden has taken action to reverse this trend. In his 2021 Executive Order on competition, he directed financial regulators and the Attorney General to review and strengthen bank merger oversight “to ensure Americans have choices among financial institutions and to guard against excessive market power.”¹⁵

However, in recent weeks, Treasury Secretary Yellen and Acting Comptroller Hsu have inexplicably indicated that they are encouraging more bank concentration. In a May 2023 statement before the House Financial Services Committee, Acting Comptroller Hsu reassured banks that the agency would be “open-minded” while considering merger proposals.¹⁶ This statement followed the OCC’s decision to approve JPMorgan’s acquisition of the failed First Republic, allowing America’s largest bank to grow by more than \$200 billion¹⁷ despite already holding more than 10% of the nation’s total deposits.¹⁸

Secretary Yellen recently warned that the banking “turmoil” from the collapse of Silicon Valley Bank, Signature Bank, and First Republic might lead to “an environment in which we’re going to see more mergers. That’s something I think the regulators will be open to, if it occurs.”¹⁹ According to a *New York Times* report, Secretary Yellen last month in a private meeting told big bank executives – including JPMorgan CEO Jamie Dimon – that “she would welcome more

¹² American Economic Liberties Project, “Revitalizing Bank Merger Enforcement to Restore Competition and Fairness in Banking,” Shahid Naeem, June 2023, http://www.economicliberties.us/wp-content/uploads/2023/06/062023_AELP_BankMerger_Brief_R2.pdf.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ White House, “Executive Order on Promoting Competition in the American Economy,” July 9, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

¹⁶ Office of the Comptroller of the Currency, “Statement of Michael J. Hsu, Acting Comptroller of the Currency, before the Committee on Financial Services, United States House of Representatives,” May 16, 2023, <https://www.occ.treas.gov/news-issuances/congressional-testimony/2023/ct-occ-2023-44-written.pdf>.

¹⁷ Politico, “JPMorgan Chase buys First Republic in bid to end bank turmoil,” Victoria Guida, May 1, 2023, <https://www.politico.com/news/2023/05/01/jpmorgan-chase-first-republic-fdic-00094622>.

¹⁸ Wall Street Journal, “Why Washington Let JPMorgan Buy First Republic,” Ben Eisen and Andrew Ackerman, May 2, 2023, <https://www.wsj.com/articles/how-washington-got-on-board-with-a-big-bank-deal-for-first-republic-609188aa>.

¹⁹ Politico, “Bank merger rethink,” Zachary Warmbrodt, May 16, 2023, <https://www.politico.com/newsletters/morning-money/2023/05/16/bank-merger-rethink-00097083>.

mergers...in part because it would make it easier for regulators to conduct oversight.”²⁰ In a recent interview, Yellen said more consolidation in banking could be “healthy” and that “[w]e have more banks, relatively speaking, in the United States than almost any country of which I’m aware.”²¹

These “comments are notable because one of President Biden’s defining economic initiatives has been to ratchet up scrutiny of big corporate mergers.”²² Yet one of the major big bank lobbying groups noted “something of a sea change in Washington over the last two months” where “at the highest levels, there is a recognition that midsize banks need to be allowed to merge and be acquired potentially by larger banks.”²³

Allowing additional bank consolidation would be a dereliction of your responsibilities, hurting American consumers and small businesses, betraying President Biden’s commitment to promoting competition in the economy, and threatening the stability of the financial system and the economy. Shoring up our banking system will require stronger regulation and more vigorous oversight of big banks to keep them from failing in the first place, and stronger merger guidelines and rules that significantly check consolidation and limit the size and number of too big to fail banks that put taxpayers at risk.

To that end, I urge you to accelerate your work to update the bank merger review guidelines to put an end to regulators’ practice of rubber stamping merger applications and strengthen the standards under which mergers are considered. To better understand the status of this work, I ask that you answer the following questions by July 10, 2023:

1. It has been nearly two years since President Biden directed your agencies to review and adopt a plan to revitalize merger oversight under the *Bank Merger Act and the Bank Holding Company Act* (Bank Merger Act).²⁴ When will you release the updated merger review guidelines?
2. The *Dodd–Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank Act) amended the Bank Merger Act to require regulators to assess a merger’s risk to the stability of the U.S. banking and financial system, in addition to other considerations.²⁵ Yet as former Federal Reserve Governor Daniel Tarullo noted, this factor “is being applied in a haphazard fashion” and “needs to be built out into a rigorous framework that provides guidance both to agency staff and banks in assessing the financial stability effects of

²⁰ New York Times, “‘Do You Even Want Us to Exist?’ A Bank Chief Fights to Survive,” Rob Copeland, June 14, 2023, <https://www.nytimes.com/2023/06/14/business/western-alliance-regional-banks.html>.

²¹ Wall Street Journal, “Janet Yellen Sees Bank Earnings Pressure, Mergers After March Crisis,” Andrew Duhren, June 23, 2023, <https://www.wsj.com/articles/yellen-says-more-bank-mergers-likely-this-year-96f69e73>.

²² Politico, “Bank merger rethink,” Zachary Warmbrodt, May 16, 2023, <https://www.politico.com/newsletters/morning-money/2023/05/16/bank-merger-rethink-00097083>.

²³ Politico, “Bank merger vibe check,” Victoria Guida and Zachary Warmbrodt, June 9, 2023, <https://www.politico.com/newsletters/morning-money/2023/06/09/bank-merger-vibe-check-00101190>.

²⁴ White House, “Executive Order on Promoting Competition in the American Economy,” July 9, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

²⁵ Brookings Institution, “Regulators should rethink the way they assess bank mergers,” Daniel K. Tarullo, March 16, 2022, <https://www.brookings.edu/opinions/regulators-should-rethink-the-way-they-assess-bank-mergers/>.

potential mergers.”²⁶ Please describe how your agencies are building out the financial stability factor into a “rigorous framework.”

3. In a June 20, 2023 speech, Assistant Attorney General Kanter announced that DOJ would look at a broader and more holistic set of criteria when evaluating bank mergers and would revive its practice of issuing comprehensive “competitive factors reports” to the banking agencies outlining DOJ’s analysis of a specific merger’s impacts on competition.²⁷ At the same time, Kanter also announced that DOJ would move away from forcing banks to divest branches as a condition for merger approval, deferring to the banking agencies to determine the appropriate remedies to competition problems.²⁸
 - a. To Assistant Attorney General Kanter: why did DOJ feel the need to relinquish its use of divestitures as a potential remedy?
 - b. To Chairman Gruenberg, Acting Comptroller Hsu, and Vice Chair Barr: How do you plan to address issues identified in a merger’s competitive factors report? Will you consider all remedies, including divestitures, when responding to DOJ’s analysis?
4. In his speech, Assistant Attorney General Kanter specified that a competitive factors report should evaluate “the many ways in which competition manifests itself in a particular banking market – including through fees, interest rates, branch locations, product variety, network effects, interoperability, and customer service.”²⁹ Will the updated bank merger guidelines similarly incorporate this broad set of criteria for evaluating mergers?
5. The Bank Merger Act requires each of the federal banking agencies to include in its annual report to Congress a summary of the competitive factors report provided by DOJ for each merger.³⁰ Chairman Gruenberg, Acting Comptroller Hsu, and Vice Chair Barr: do you intend to publish these summaries, consistent with the law?

Sincerely,



Elizabeth Warren
United States Senator

²⁶ *Id.*

²⁷ Department of Justice, press release, “Assistant Attorney General Jonathan Kanter Delivers Keynote Address at the Brookings Institution’s Center on Regulation and Markets Event ‘Promoting Competition in Banking,’” June 20, 2023, https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-address-brookings-institution#_ftn2.

²⁸ *Id.*

²⁹ *Id.*

³⁰ 12 U.S. Code § 1828(c)(9)(B).