

May 7, 2020

Jay Powell
Chairman, Federal Reserve Board
Mariner Eccles Federal Reserve Building
2051 Constitution Avenue NW
Washington, DC 20418

Steven Mnuchin
Secretary of the Treasury
Dept. of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

Dear Chairman Powell and Secretary Mnuchin:

We write to urge the Federal Reserve Board and the Treasury to require a freeze on all mergers and acquisitions activity by otherwise viable corporations as a condition for use of the credit programs authorized under the CARES Act and Section 13(3) of the Federal Reserve Act. The Fed must aggressively attempt to retain institutional credibility as a neutral actor in our economic order with regards to the distributional effects of its policies. It should not help finance a merger wave that leads to large-scale consolidation of companies which would have been healthy competitors but for temporary impacts of the current crisis.

In response to the Coronavirus pandemic, the Federal Reserve and Treasury have taken swift action to “assist households and employers of all sizes” by facilitating the flow of credit in the economy. As you noted, the Fed’s goal is “to provide as much relief and stability as we can during this period of constrained economic activity.”¹ While public support for business enterprise is critical in this moment of crisis, we believe the Federal Reserve and Treasury should ensure that the public safety net created to preserve credit and business enterprise is not used to finance consolidations in the economy.

Without restrictions, Treasury and Federal Reserve provisioning of inexpensive borrowing capacity to larger institutions will likely facilitate such consolidations. Financial crises are moments when those with access to credit can buy up distressed assets on the cheap. As former Assistant Attorney General for Antitrust Bill Baer noted, “many markets are going to become more concentrated. We will see it in all sectors, from agriculture and retail to manufacturing and travel. Fewer competitors means less competition, more market power for some sellers and some buyers, and more risk of tacit price coordination.”²

Enabling consolidation will contravene the intent of the support otherwise provided by the Fed, whose mandate is to support price stability and full employment. Most mergers are value-destructive.³ Studies show that mergers and consolidation have deleterious effects on wages and

¹ “Federal Reserve takes additional actions to provide up to \$2.3 trillion in loans to support the economy,” Federal Reserve Press Release, April 9, 2020, <https://www.federalreserve.gov/newsevents/pressreleases/monetary20200409a.htm>

² “Why we need antitrust enforcement during the Covid-19 pandemic,” Bill Baer, *Brookings Institute Techtank Blog*, April 22, 2020, <https://www.brookings.edu/blog/techtank/2020/04/22/why-we-need-antitrust-enforcement-during-the-covid-19-pandemic/>

³ Based on a range of studies, mergers have a failure rate of anywhere between 50 and 85 percent. A KPMG study found that the majority do not increase shareholder returns, and an A.T. Kearney study found that total returns were negative. See: “Why mergers fail,” Margaret Fernan, *CBS News*, April 24, 2012, <https://www.cbsnews.com/news/why-mergers-fail/>

job growth. Entrenched, concentrated firms hire fewer workers, produce less output, and earn higher profits than would otherwise be the case in a competitive market.⁴ As employer power over labor markets increases, employment falls, and employees find it harder to leave their jobs to seek higher-paying employment. According to one study, employment is roughly 13 percent less today than it would be in a competitive labor market.⁵ Similarly, mergers between companies in concentrated markets raise prices, while competition tends to retain lower prices.⁶

During the last financial crisis, the financial support provided to large institutions facilitated a merger wave, with resulting layoffs and price hikes. Here is a short sample of high-profile mergers that took place from 2008-2010, and their impacts.

- In 2009, Pfizer Inc acquired Wyeth for \$67.2 billion, laying off 19,500 employees even as Wyeth executives received \$75 million between them in severance.⁷ From 2012-2015 34% of Pfizer's revenue growth came from increasing prices on existing drugs, and the corporation reduced R&D spending from \$9.48 billion in 2010 to \$6.68 billion in 2013, 7.69 billion in 2015.⁸
- In 2008, InBev NV acquired Anheuser-Busch Cos Inc for \$52.2 billion, and proceeded to cut 10-15% of its full-time salaried workforce, roughly 3,000 jobs. Beer prices rose 5% a year on average, for several years after the merger.⁹
- In 2008, Bank of America Corp acquired Merrill Lynch & Co Inc for \$48.8 billion, with more than 35,000 in layoffs as a result. The combined entity approved \$5.8 billion in bonuses that year.¹⁰

⁴ “The State of Competition and Dynamism: Facts about Concentration, Start-Ups, and Related Policies,” Jay Shambaugh, Ryan Nunn, Audrey Breitwieser, and Patrick Liu, Brookings Institute, The Hamilton Project, June 2018, https://www.brookings.edu/wp-content/uploads/2018/06/ES_THP_20180611_CompetitionFacts_20180611.pdf

⁵ “Antitrust Remedies for Labor Market Power,” Suresh Naidu, Eric A. Posner, and E. Glen Weyl, *Harvard Law Review*, September 21, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3129221

⁶ “The Structural Presumption and the Safe Harbor in Merger Review: False Positives, or Unwarranted Concerns?” John E. Kwoka, May 19, 2016, <https://ssrn.com/abstract=2782152>

⁷ “As Layoffs Begin, Wyeth Execs Get \$75 Million Severance Package,” Jim Edwards, *CBS News*, February 9, 2009, <https://www.cbsnews.com/news/as-layoffs-begin-wyeth-execs-get-75-million-severance-package/>; “Pfizer Layoffs: Whose Jobs Are Safe, and Whose Aren’t,” Jim Edwards, *CBS News*, January 13, 2010, <https://www.cbsnews.com/news/pfizer-layoffs-whose-jobs-are-safe-and-whose-arent/>

⁸ “Pfizer’s CEO Faces The Drug Pricing Firestorm,” Matthew Herper, *Forbes*, October 13, 2015, <https://www.forbes.com/sites/matthewherper/2015/10/13/why-viagra-keeps-going-up-pfizers-ceo-on-the-drug-pricing-controversy/#69956f8866af>; “Pfizer’s expenditure on research and development from 2006 to 2019,” Matej Mikulic, *Statista*, March 5, 2020, <https://www.statista.com/statistics/267810/expenditure-on-research-and-development-at-pfizer-since-2006/>

⁹ “Anheuser-Busch cuts 1,400 jobs,” Julianne Pepitone, *CNN Money*, December 8, 2008, https://money.cnn.com/2008/12/08/news/companies/anheuser_job_cuts/index.htm; “The Season for Stockpiling Beer,” Brad Tuttle, *TIME Magazine*, August 3, 2012, <https://business.time.com/2012/08/03/is-summer-the-season-for-stockpiling-beer/>

¹⁰ “Job cuts keep BofA paying full construction bond,” William Hamilton, *Providence Business News*, September 18, 2010, <https://pbn.com/job-cuts-keep-bofa-paying-full-construction-bond52490/>; “BofA pays \$2.4 billion to settle claims over Merrill,” Martha Graybow, Rick Rothacker, *Reuters*, September 28, 2012, <https://www.reuters.com/article/us-bofa-lawsuit/bofa-pays-2-4-billion-to-settle-claims-over-merrill-idUSBRE88R0PR20120928>

- The same year, JPMorgan Chase acquired Bear Stearns for \$1.4 billion, laying off about 7,000 people.¹¹ JPMorgan paid \$1.12 billion in bonuses in 2008, and CEO Jamie Dimon said that the year of the global financial crisis was his bank's "finest year ever."¹²
- In 2009, Roche Holdings AG acquired Genentech Inc for \$46.7 billion.¹³ The corporation laid out 1,000 job losses in New Jersey and released a new breast cancer drug at a 31% price premium to its existing gold standard breast cancer drug in 2012.¹⁴
- In 2010, Oracle acquired Sun Microsystems for \$7.4 billion, laying off 1,000 employees. layoffs. Business lines consolidated as software integrated into hardware to raise profit margins.¹⁵ The combined entity reduced output and sought to retroactively increase prices on core software infrastructure.¹⁶

While these mergers were high profile, there were many more that took place during the financial crisis and especially as the recovery began. There were 716 mergers above the Hart-Scott-Rodino threshold in 2009, and this number accelerated upward as the financial system stabilized, to 1,166 in 2010, and 1,450 in 2011.¹⁷ The recovery from the deep recession was unusually slow, with some postulating that job growth was both geographically uneven and lagged in part due to higher levels of concentration.¹⁸

Corporations seeking to merge are not the only potential set of actors whose use of Fed-supported funding can contravene the Fed's mandate for full employment. Credit provided to private equity funds can have significant effects on employment. As researchers Steven J. Davis, John Haltiwanger, Kyle Handley, Ben Lipsius, Josh Lerner and Javier Miranda found, private equity takeovers on aggregate reduce jobs at target companies by 4.4%, with significant variations based

¹¹ "JPMorgan completes takeover of Bear Stearns," *Reuters*, May 21, 2008, <https://www.reuters.com/article/us-bearstearns-jpmorgan/jpmorgan-completes-takeover-of-bear-stearns-idUSN3143823420080531>

¹² "Banks Paid \$32.6 Billion in Bonuses Amid U.S. Bailout (Bloomberg)," Karen Freifeld, Senator Bernie Sanders Newsroom, July 30, 2009, <https://www.sanders.senate.gov/newsroom/must-read/banks-paid-326-billion-in-bonuses-amid-us-bailout-bloomberg>; "Jamie Dimon on the 'Traumatic TARP Experience,'" *The New York Times*, May 19, 2009, <https://dealbook.nytimes.com/2009/05/19/jamie-dimon-on-jpmorgans-finest-year/>

¹³ "Roche Agrees to Buy Genentech for \$46.8 Billion," Andrew Pollack, *The New York Times*, March 12, 2009, <https://www.nytimes.com/2009/03/13/business/worldbusiness/13drugs.html>

¹⁴ "Roche to Shut Former U.S. Headquarters," Andrew Pollack, *The New York Times*, June 26, 2012, <https://www.nytimes.com/2012/06/27/business/roche-to-shut-down-former-us-headquarters-after-83-years.html>;

"Perjeta, the Cost of HER2 Breast Cancer Therapy Goes Up," *Practice Update*, June 18, 2012, <https://www.practiceupdate.com/content/with-perjeta-the-cost-of-her2-breast-cancer-therapy-goes-up/12388>

¹⁵ "Oracle CEO: about 1,000 layoffs planned for Sun," Associated Press Staff, *Cleveland.com*, January 27, 2010, https://www.cleveland.com/business/2010/01/oracle_ceo_about_1000_layoffs.html; "Oracle in \$7.4bn swoop on Sun," Richard Waters, *Financial Times*, April 20, 2009, <https://www.ft.com/content/3614fc18-2da7-11de-9eba-00144feabdc0>

¹⁶ "LibreOffice and OpenOffice.org: One Year After the Schism," Scott Merrill, *TechCrunch*, October 7, 2011, <https://techcrunch.com/2011/10/07/libreoffice-and-openoffice-org-one-year-after-the-schism/>;

"Oracle finally targets Java non-payers – six years after plucking Sun," Gavin Clarke, *The Register*, December 16, 2016, https://www.theregister.co.uk/2016/12/16/oracle_targets_java_users_non_compliance/

¹⁷ See Appendix A of "Hart-Scott-Rodino Annual Report, Fiscal Year 2016," Federal Trade Commission and Department of Justice, https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014_fy_2016_hsr_report_final_october_2017.pdf

¹⁸ "Dynamism in Retreat," Economic Innovation Group, February 2017, <https://eig.org/wp-content/uploads/2017/07/Dynamism-in-Retreat-A.pdf>; "The New Map of Economic Growth and Recovery," Economic Innovation Group, May 2016, <https://eig.org/wp-content/uploads/2016/05/recoverygrowthreport.pdf>

on the type of takeover and the credit cycle. They also found that “compensation per worker falls by 1.7% at target firms after buyouts.”¹⁹ As co-Director of the Center for Economic Policy Research Eileen Appelbaum notes, there are reasons to believe that this study vastly understates job losses and wage reductions by the median affected worker in PE takeovers.²⁰

As Janet Yellen observed in 2016, the impact of monetary actions is unevenly distributed across groups in society, depending on size, access to credit, sensitivity to labor income, and a variety of other factors.²¹ There is limited research on the relationship of monetary policy and support programs like those authorized by the CARES Act to distributional consequences and concentration. Nevertheless, there is sufficient reporting to suggest that concentration is hindering the achievement of full employment. A very clear example of the problem of concentration is initial reports of how larger banks have allocated Paycheck Protection Program funds with far less flexibility and attentiveness to customers than smaller banks. As the *LA Times* noted, “Some of the nation’s top banks lagged behind relatively tiny rivals in handling applications.”²² One reason the small business lending program has been mired in struggles is because a steady decline in small and community banks. Since the financial crisis, there has been little new bank entry, and antitrust enforcement to prohibit mergers has been weak. From 2006-2017, the Federal Reserve did not formally deny a single bank merger.²³ As the Board of Governors noted in 2019, “between 2012 and 2017, more than 100 banking markets went from containing the headquarters of at least one bank to containing no bank’s headquarters.”²⁴ In the last crisis, the total assets of the four largest U.S. bank holding companies grew by 54 percent, driven largely by mergers.

The decline in national lending capacity is mirrored in declines of similar industrial ecosystems critical to creating or sustaining independent businesses and jobs. As the Institute for Local Self-Reliance noted in 2019, independent businesses report that they are paying higher prices and

¹⁹ “The Economic Effects of Private Equity Buyouts,” Steven J. Davis, John Haltiwanger, Kyle Handley, Ben Lipsius, Josh Lerner, Javier Miranda, Harvard Business School Working Paper 20-046, https://www.hbs.edu/faculty/Publication%20Files/20-046_ceb00b98-e62a-45db-8d5f-9793ffd0226e.pdf

²⁰ “Private Equity Firms Have Caused Painful Job Losses And More Are Coming,” Mayra Rodriguez Valladares, *Forbes*, October 30, 2019, <https://www.forbes.com/sites/mayrarodriguezvalladares/2019/10/30/private-equity-firms-have-caused-painful-job-losses-and-more-are-coming/#69b180177bff>

²¹ “Macroeconomic Research After the Crisis,” Janet L. Yellen, Board of Governors of the Federal Reserve System, October 14, 2016, <https://www.federalreserve.gov/newsevents/speech/yellen20161014a.htm>.

²² “Biggest banks ‘prioritized’ larger clients for small business loans, lawsuits claim,” Stephen Gandel, *CBS News*, April 20, 2020, <https://www.cbsnews.com/news/paycheck-protection-program-big-banks-loans-larger-clients-over-smaller-businesses/>; “Coronavirus rescue loans for small business went to community lenders as big banks fumbled,” Hannah Levitt, *Los Angeles Times*, April 18, 2020, <https://www.latimes.com/business/story/2020-04-18/small-business-loans-coronavirus-unemployment>

²³ Letter from Jerome H. Powell to Senator Elizabeth Warren, May 10, 2018, <https://www.warren.senate.gov/imo/media/doc/Powell%20Response%20re%20Mergers.pdf>; “Data Point: Small Business Lending and the Great Recession,” Consumer Financial Protection Bureau, January 2020, https://files.consumerfinance.gov/f/documents/cfpb_data-point_small-business-lending-great-recession.pdf

²⁴ “Perspectives from Main Street: Bank Branch Access in Rural Communities,” Board of Governors of the Federal Reserve System, November 2019, <https://www.federalreserve.gov/publications/files/bank-branch-access-in-rural-communities.pdf>

receiving less favorable terms as a result of growing concentration among suppliers.²⁵ Fragile distribution or retail ecosystems are already vulnerable, and increased concentration would make it even harder to rebuild.

Give the combination of fiscal and monetary support and the magnitude of the economic and financial shock of this pandemic, it is incumbent upon the Fed and Treasury to ensure that their swift and bold action is used to support and preserve viable competitive firms rather than facilitate what could be in effect a taxpayer-supported corporate power grab.

The Federal Reserve has already imposed a number of policy conditions on borrowers availing themselves of credit at new announced facilities. In the Primary and Secondary Market Corporate Credit Facility, borrowers must abide by conflict of interest provisions, be primarily based in the United States, and get no other assistance from any other programs from the CARES Act. Borrowers from the Main Street Lending Facility must adhere to restrictions around stock buybacks, dividends, and executive compensation.²⁶ Any private sector lender would request the use of proceeds in a loan that it made and would not finance activities that it did not wish to support. There is also precedent in Federal Reserve policy. In 1986, Fed Chair Paul Volcker imposed restrictions on the use of junk bonds for merger activity.²⁷ Given that the Federal Reserve will now be buying high-yield bonds directly, restrictions make sense.

As Adam Tooze recently put it, the Federal Reserve has become the institution at the “center of our economic governance.”²⁸ We appreciate your recognition of your role as a key actor and your swift willingness to disclose transaction level data on borrowers and the credit they receive. We would encourage you to put in place measures to ensure that the facilities you have made available to preserve business enterprise do in fact accomplish that goal, instead of encouraging mergers and acquisitions activity. We also urge you not to approve any pending or future bank merger proposals during the period of the COVID-19 pandemic.

Sincerely,
Action Center for Race and the Economy
American Economic Liberties Project
Americans for Financial Reform
Center for Economic and Policy Research
Demand Progress
Institute for Local Self Reliance
Main Street Alliance
Public Citizen

²⁵ “Survey: Independent Businesses See Major Threats in Amazon, Corporate Concentration,” Institute for Local Self-Reliance, August 6, 2019, <https://ilsr.org/2019-independent-business-survey/>

²⁶ “Term Sheet: Primary Market Corporate Credit Facility,” April 9, 2020, <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200409a5.pdf>; “Term Sheet: Secondary Market Corporate Credit Facility,” April 9, 2020, <https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200409a2.pdf>

²⁷ “Fed Adopts ‘Junk Bond’ Curbs,” Robert D. Hershey Jr., *The New York Times*, January 9, 1986, <https://www.nytimes.com/1986/01/09/business/fed-adopts-junk-bond-curbs.html>

²⁸ “Shockwave: Adam Tooze on the pandemic’s consequences for the world economy,” Adam Tooze, *London Review of Books*, April 16, 2020, <https://www.lrb.co.uk/the-paper/v42/n08/adam-tooze/shockwave>

Public Equity Stakeholder Project

cc:

Assistant Attorney General Makan Delrahim, U.S. Department of Justice, Antitrust Division

The Honorable Joseph J. Simons, Chairman, Federal Trade Commission

The Honorable Rohit Chopra, Commissioner, Federal Trade Commission

The Honorable Noah Joshua Phillips, Commissioner, Federal Trade Commission

The Honorable Rebecca Kelly Slaughter, Commissioner, Federal Trade Commission

The Honorable Christine S. Wilson, Commissioner, Federal Trade Commission

The Honorable Michael S. Lee, Chairman, Subcommittee on Antitrust, Competition Policy and Consumer Rights, Committee on the Judiciary, U.S. Senate

The Honorable Amy Klobuchar, Ranking Member, Subcommittee on Antitrust, Competition Policy and Consumer Rights, Committee on the Judiciary, U.S. Senate

The Honorable David N. Cicilline, Chairman, Subcommittee on Antitrust, Commercial and Administrative Law, Committee on Judiciary, U.S. House of Representatives

The Honorable James F. Sensenbrenner, Jr., Ranking Member, Subcommittee on Antitrust, Commercial and Administrative Law, Committee on the Judiciary, U.S. House of Representatives

The Honorable Mike Crapo, Chairman, Committee on Banking, Housing, and Urban Affairs, U.S. Senate

The Honorable Sherrod Brown, Ranking Member, Committee on Banking, Housing, and Urban Affairs, U.S. Senate

The Honorable Maxine Waters, Chairwoman, Committee on Financial Services, U.S. House of Representatives

The Honorable Patrick McHenry, Ranking Member, Committee on Financial Services, U.S. House of Representatives