William Michael Cunningham
Economist and Impact Investing Researcher

March 27, 2022

Mr. James P. Sheesley
Assistant Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: Comments-RIN 3064-ZA31

Dear Mr. Sheesley,

We understand that the FDIC "is soliciting comments from interested parties regarding the application of the laws, practices, rules, regulations, guidance, and statements of policy (together, regulatory framework) that apply to merger transactions involving one or more insured depository institution, including the merger between an insured depository institution and a noninsured institution. The FDIC is interested in receiving comments regarding the effectiveness of the existing framework in meeting the requirements of section 18(c) of the Federal Deposit Insurance Act (known as the Bank Merger Act)."

We provide comments below. Our understanding is borne of significant experience, knowledge which has given the firm in depth comprehension of these issues. We have expertise that is unmatched in either duration or depth:

Federal Appeals and lower courts have accepted several "Amicus Curiae" or "Friend of the Court" briefs we filed in signal cases concerning financial marketplace structure and fraud cases:

> The U.S. Court of Appeals for the District of Columbia Circuit accepted a "Friend of the Court" brief filed by William Michael Cunningham in Mozilla Corporation vs. the Federal Communications Commission (net neutrality). https://www.prlog.org/12729944-william-michael-cunningham-files-amicus-brief-in-net-neutrality-case-18-cv-1051.html
>
> Amicus Brief in Fiduciary Rule Case (16-cv-1035): https://www.prlog.org/12573252-william-michael-cunningham-files-amicus-brief-in-fiduciary-rule-case-16-cv-1035.html
>
> Amicus Brief in Met Life v FSOC (16-5086): https://www.prlog.org/12570202-william-michael-cunningham-files-amicus-brief-in-met-life-fsoc-16-5086.html
>
> Amicus Brief in Galvin v SEC (15-1150): https://www.prlog.org/12499745-william-michael-cunningham-files-amicus-brief-in-galvin-sec-15-1150.html
>
> Amicus Brief in US vs. S&P (US District Court, Central District CA): https://www.prlog.org/12256590-william-michael-cunningham-files-amicus-brief-in-us-vs-sp-us-district-court-central-district-ca.html

Revised brief in SEC vs. Citigroup (2nd Cir Ct of Ap):
https://www.prlog.org/11948760-william-michael-cunningham-files-revised-brief-in-sec-vs-citigroup-2nd-cir-ct-of-ap.html

We also have significant relevant experience:

- We developed the first targeted Mortgage-backed Security investment CRA securitization, an MBS pool backed by loans from minority financial institutions. We designed and created the investment in 1992. (See: https://www.creativeinvest.com/wglelca.pdf)
- In 1993, at the First Annual Greenlining Institute Conference on Community Development, we suggested the creation of government backed venture capital funds to take first risk position in the provision of equity capital to small, minority businesses on Georgia Avenue in NW Washington, DC. This morphed into the New Markets Tax Credit program, a real estate focused "community development" program that has fueled gentrification.
- Mr. Cunningham is an unaffiliated member of NARALO, the North American Regional At-Large Organization of ICANN, the Internet Corporation for Assigned Names and Numbers.
- Mr. Cunningham's presentation at the Texas Association of African American Chambers of Commerce resulted in successful crowdfunding legislation for the State of Texas. http://www.dallasweekly.com/business/article_02669560-45ca-11e5-85d2-e7192082a1d2.html
- On February 3, 2015, Mr. Cunningham commented on an effort by Apple Computer to utilize women and minority-owned brokerage firms: http://www.usatoday.com/story/tech/2015/02/03/apple-debt-offering-minority-firms-jesse-jackson-diversity-silicon-valley/22805673/

Mr. Cunningham has published articles on banking issues in the Washington Post (see: https://www.washingtonpost.com/business/capitalbusiness/commentary-crowdfunding-can-provide-new-financing-option-for-minority-firms/2012/06/01/gJQAThq7BV_story.html?utm_term=.0e8c32762d95)
and in the American Banker Newspaper (see: https://www.americanbanker.com/opinion/time-to-clean-house-at-wells-fargo and https://www.americanbanker.com/opinion/cryptocurrency-regulation-is-a-job-for-treasury).

We are the premier firm in understanding and analyzing ESG trends as they impact global economic systems. Our research has focused on "long-term changes that will affect and influence the economy, financial system, society and environment at large." For more information, please see: Global Market Turmoil Graphic and Financial Crisis Calendar Graphic, December, 2008 and November, 2009.

Our comments follow a series of forecasts we have issued:

- On July 3, 1993, Mr. Cunningham wrote to US Securities and Exchange Commissioner (SEC) Mary Schapiro to notify the Commission about a specific investing scam, the "Nigerian letter scam." A timely warning was not issued to the investing public, members of the public were damaged, and the SEC launched retaliatory regulatory actions against Mr. Cunningham. https://www.creativeinvest.com/SECNigerianLetter.pdf

- In October 1998, in a petition to the United States Court of Appeals for the District of Columbia Circuit in opposition to the Citigroup/Travelers merger, we cited evidence that growing financial market malfeasance greatly exacerbated risks in financial markets, reducing the safety and soundness of large financial institutions. We went on to note that:

    - *"The nature of financial market activities is such that significant dislocations can and do occur quickly, with great force. These dislocations strike across institutional lines. That is, they affect both banks and securities firms. The financial institution regulatory structure is not in place to effectively evaluate these risks, however. Given this, the public is at risk."*
    - On July 25, 2012, the New York Times reported that Sanford I Weill, former chairman and chief executive of defendant Citigroup "called for a wall between a bank's deposit-taking operations and its risky trading businesses. In other words, he would like to resurrect the regulation (Glass-Stegall) that he once fought."

- On June 15, 2000, we testified before the House Financial Services Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises (GSE's) of the US Congress. We suggested that the GSE's (Fannie Mae and Freddie Mac) be subject to a thorough "Social Audit." A Social Audit is an examination of the performance of an enterprise relative to certain social objectives. It also includes a review of ethical practices at the firm. Had they been subject to this audit, certain flaws in their operation which led to their failure, including ethical shortcomings, would have been revealed earlier.

- In 2001, Mr. Cunningham helped create the first wide scale home mortgage loan modification project. See: *Property Flipping Remediation Yields Investment-grade Security* at: http://www.creativeinvest.com/remediation.pdf

- On December 22, 2003, statistical models we created using the Fully Adjusted Return ®Methodology signaled the probability of system-wide economic and market failure. See page 6: http://www.sec.gov/rules/proposed/s71903/wmccir122203.pdf

- On Monday, April 11, 2005, we testified before Judge William H. Pauley III in the U.S. District Court for the Southern District of New York on behalf of investors at a fairness hearing regarding the $1.4 billion-dollar Global Research Analyst Settlement.

- In 2005, we served as an expert witness for homeowners in a case against PMI Group, Credit Suisse First Boston, Moody's, Standard and Poor's, Fairbanks Capital Corporation, Select Portfolio Servicing, US Bank National Association, as Trustee of CSFB ABS Series 2002-HEI, et. al., in the New Jersey Superior Court Law Division - Monmouth County. Our expert witness testimony held corporate parties responsible for facilitating predatory lending practices. Had this single case been successful, we believe the financial crisis of 2008 would not have occurred.

- On December 22, 2005, Mr. Cunningham met with Ms. Elaine M. Hartmann of the Division of Market Regulation at the U.S. Securities and Exchange Commission. At that meeting, he issued a strongly worded warning that system-wide economic and market failure was a growing possibility.

- On June 18, 2009, Mr. Cunningham testified before the House Ways and Means Select Revenue Measures Subcommittee at a joint hearing with the Subcommittee on Domestic Monetary Policy and Technology of the Financial Services Committee: Testimony on the New Markets Tax Credit Program. (See: https://financialservices.house.gov/media/file/hearings/111/printed%20hearings/111-47.pdf)

- On August 13, 2015, Mr. Cunningham provided testimony on the Department of Labor's Fiduciary Rule. Online at https://youtu.be/kOGS-DdLYe0

- Our June 11, 2016 forecast predicted the election of Donald J. Trump. See: Why Trump Will Win. https://www.linkedin.com/pulse/why-trump-win-william-michael-cunningham-am-mba/ and https://www.linkedin.com/pulse/trumpism-william-michael-cunningham-am-mba/

We incorporate these documents by reference.

Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions

The FDIC has requested comments on the following questions:

Question 1. Does the existing regulatory framework properly consider all aspects of the Bank Merger Act as currently codified in Section 18(c) of the Federal Deposit Insurance Act?

Question 2. What, if any, additional requirements or criteria should be included in the existing regulatory framework to address the financial stability risk factor included by the Dodd-Frank Act? Are there specific quantitative or qualitative measures that should be used to address financial stability risk that may arise from bank mergers? If so, are there specific quantitative measures that would also ensure greater clarity and administrability?

Should the FDIC presume that any merger transaction that results in a financial institution that exceeds a predetermined asset size threshold, for example $100 billion in total consolidated assets, poses a systemic risk concern?

Question 3. To what extent should prudential factors (for example, capital levels, management quality, earnings, etc.) be considered in acting on a merger application? Should bright line minimum standards for prudential factors be established? If so, what minimum standard(s) should be established and for which prudential factor(s)?

Question 4. To what extent should the convenience and needs factor be considered in acting on a merger application? Is the convenience and needs factor appropriately defined in the existing framework? Is the reliance on an insured depository institution's successful Community Reinvestment Act performance evaluation record sufficient? Are the convenience and needs of all stakeholders appropriately addressed in the existing regulatory framework? To what extent and how should the convenience and needs factor take into consideration the impact that branch closings and consolidations may have on affected communities? To what extent should the FDIC differentiate its consideration of the convenience and needs factor when considering merger transactions involving a large insured depository institution and merger transactions involving a small insured depository institution? To what extent should the CFPB be consulted by the FDIC when considering the convenience and needs factor and should that consultation be formalized?

Question 5. In addition to the HHI, are there other quantitative measures that the federal banking agencies should consider when reviewing a merger application? If so, please describe the measures and how such measures should be considered in conjunction with the HHI. To what extent should such quantitative measures be differentiated when considering mergers involving a large insured depository institution and mergers involving only small insured depository institutions?

Question 6. How and to what extent should the following factors be considered in determining whether a particular merger transaction creates a monopoly or is otherwise anticompetitive?

Please address the following factors:

(a) The merging parties do not significantly compete with one another; (b) Rapid economic change has resulted in an outdated geographic market definition and an alternate market is more appropriate;

(c) Market shares are not an adequate indicator of the extent of competition in the market;

(d) A thrift institution is actively engaged in providing services to commercial customers, particularly loans for business startup or working capital purposes and cash management services;

(e) 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;

(f) There is actual competition by out-of-market institutions for commercial customers, particularly competition for loans for business startup or working capital purposes; and (g) There is actual competition by non-bank institutions for commercial customers, particularly competition for loans for business startup or working capital purposes.

With respect to the preceding factors, how and to what extent should the activity of current branches or pending branch applications be considered?

Question 7. Does the existing regulatory framework create an implicit presumption of approval? If so, what actions should the FDIC take to address this implicit presumption?

Question 8. Does the existing regulatory framework require an appropriate burden of proof from the merger applicant that the criteria of the Bank Merger Act have been met?

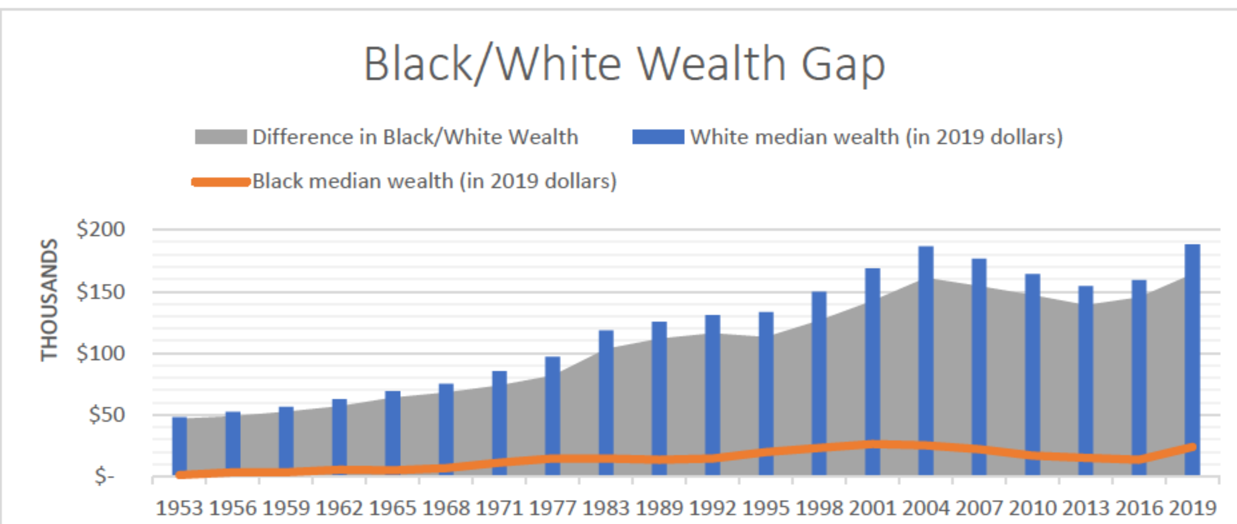
If not, what modifications to the framework would be appropriate with respect to the burden of proof? Question 9. The Bank Merger Act provides an exception to its requirements if the responsible agency finds that it must act immediately in order to prevent the probable failure of one of the insured depository institutions involved in the merger transaction.

To what extent has this exception proven beneficial or detrimental to the bank resolution process and to financial stability? Should any requirements or controls be put into place regarding the use of this exemption, for example when considering purchase and assumption transactions in a large bank resolution? Are there attributes of GSIB resolvability, such as a Total Loss-Absorbing Capacity (TLAC) requirement, that could be put into place that would facilitate the resolution of a large insured depository institution without resorting to a merger with another large institution or a purchase and assumption transaction with another large institutions?

Question 10. To what extent would responses to Questions 1-9 differ for the consideration of merger transactions involving a small insured depository institution? Should the regulations and policies of the FDIC be updated to differentiate between merger transactions involving a large insured depository institution and those involving a small insured depository institution? If yes, please explain. How should the FDIC define large insured depository institutions for these purposes?

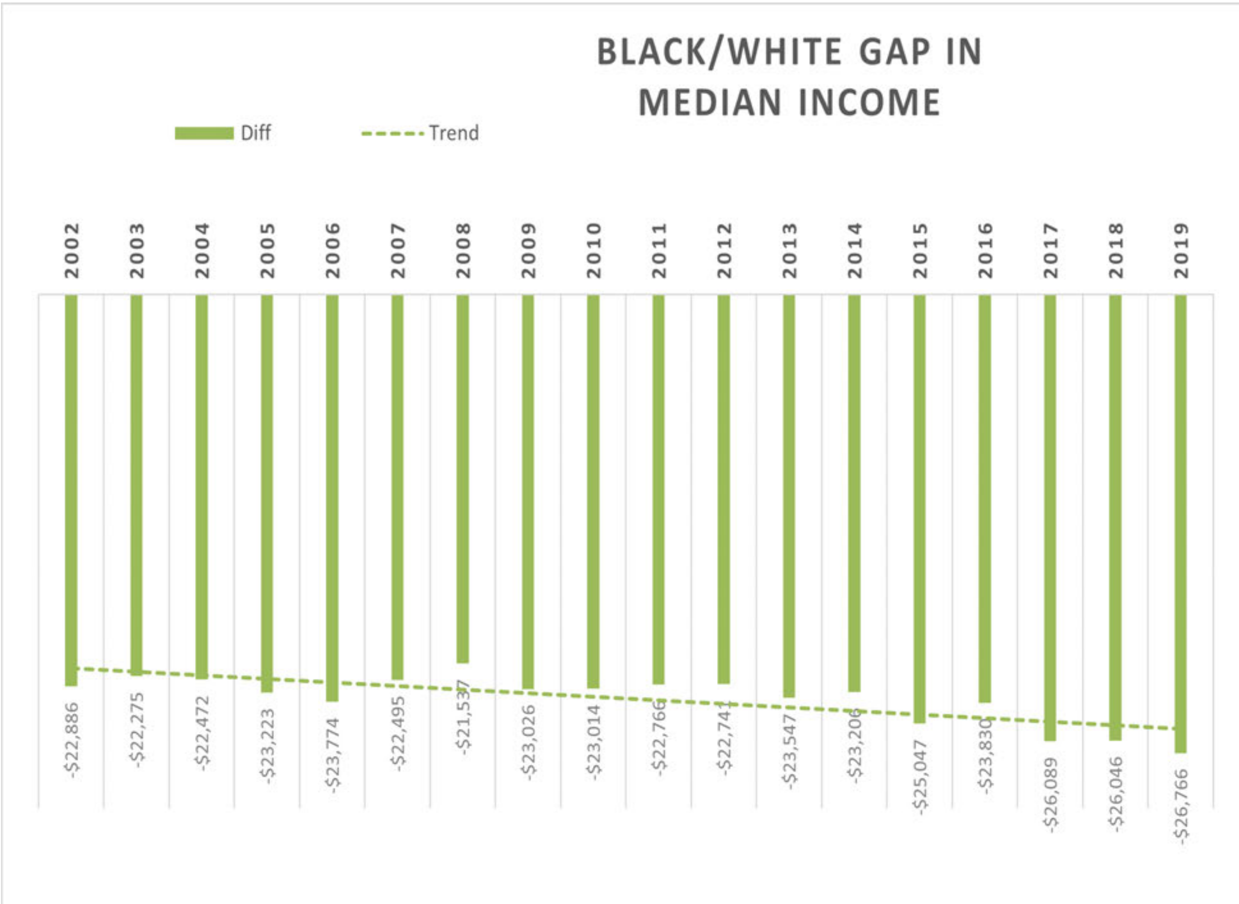
Comments

Our economic models (and the charts below) show clearly the effectiveness of the existing framework in meeting the requirements of section 18(c) of the Federal Deposit Insurance Act (known as the Bank Merger Act)" and the outcome of this and related regulatory efforts.



Note: Figures refer to net worth for the median family, which the Federal Reserve defines similarly to the U.S. Census Bureau's "household." Data is missing for 1974, 1980 and 1986. Source: Moritz Kuhn, Moritz Schularick and Ulrike I. Steins, "Income and Wealth Inequality in America, 1949-2016," and Federal Reserve Survey of Consumer Finances.

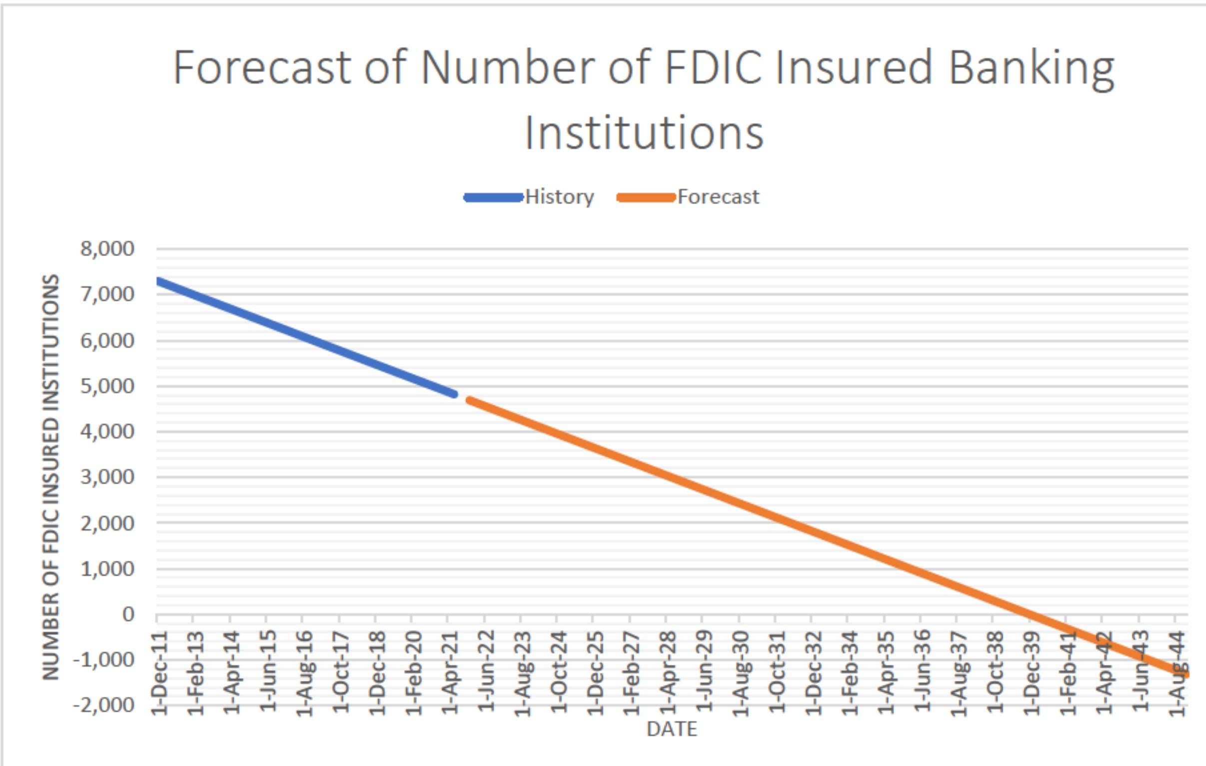
Fully detailing and describing these model outcomes would serve no purpose other than to enrich a set of non-African American individuals and entities while simultaneously damaging the public.



While we decline to fully answer the queries posed, note the following: as Mr. Cunningham has demonstrated, inadequate consideration of the public interest damaged the public and investors.[1] Current regulatory practices protect the monetary interest of a narrow set of non-African American persons, fail to protect the general public, and damage the Country's long term economic prospects.

[1] For example, see: Fed Unveils Stricter Trading Rules Amid Fallout from Ethics Scandal. Jeanna Smialek, Oct. 21, 2021. The New York Times. Online at: https://www.nytimes.com/2021/10/21/business/federal-reserve-trading-ethics.html and Bankers Cast Doubt On Key Rate Amid Crisis https://www.wsj.com/articles/SB120831164167818299?reflink=desktopwebshare_twitter via @WSJ

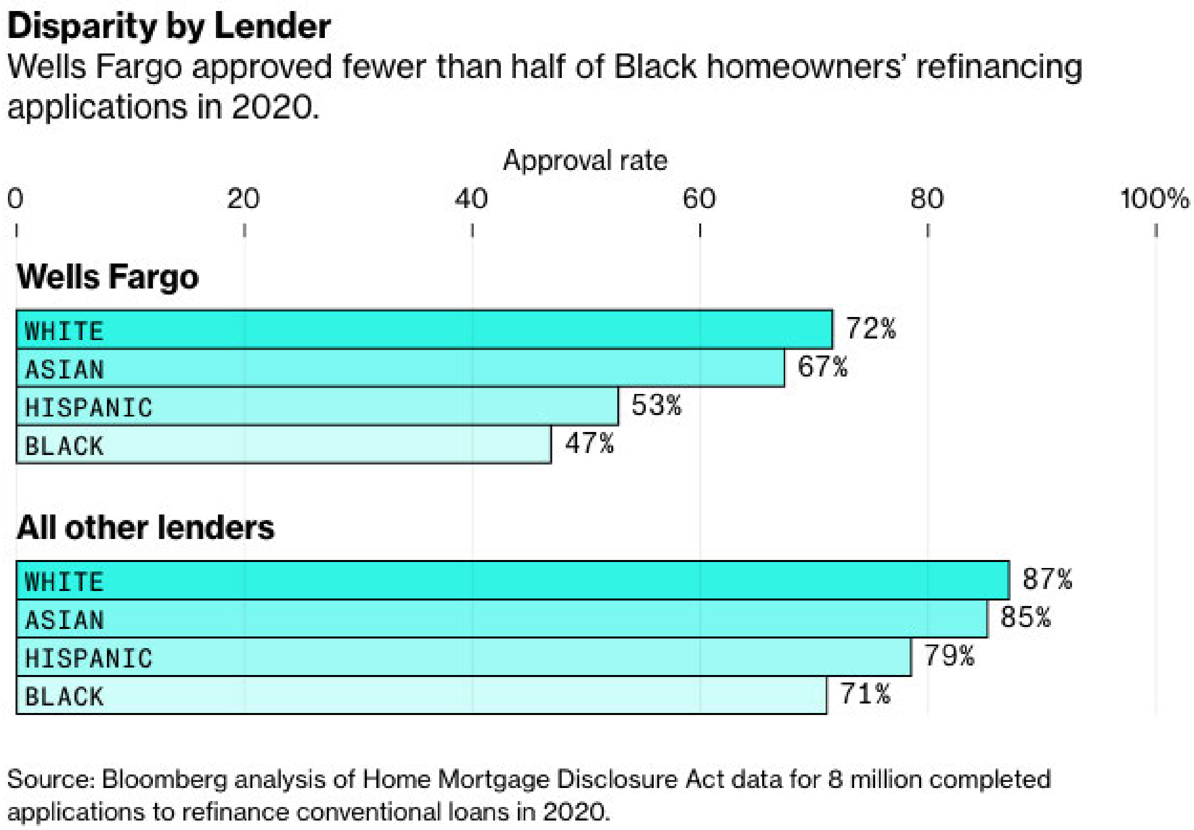
These regulatory failings have real implications for the public. Banking regulators have abdicated their responsibility to consider the public interest, if that interest includes maintaining a fair, competitive financial services industry. Our forecast indicates that by 12/31/2039, if current trends continue in a linear manner, the number of FDIC insured institutions will be approximately 1-2. Note that, with growing competition from fintech firms and alternatives, like bitcoin, this may imply the wholesale exit of banking institutions from both the FDIC and Federal Reserve systems. This would not be in the public interest.



Regulators have even failed to apply normalized standards of ethics, important for banking system confidence. (See Footnote 1 and Appendix A: FDIC Protest).

The FDIC is simply unable to protect Black borrowers or to regulate in the public interest, and, therefore, cannot appropriately supervise merged entities.

The banking marketplace is, apparently, dominated by racist, anti-Black behavior:



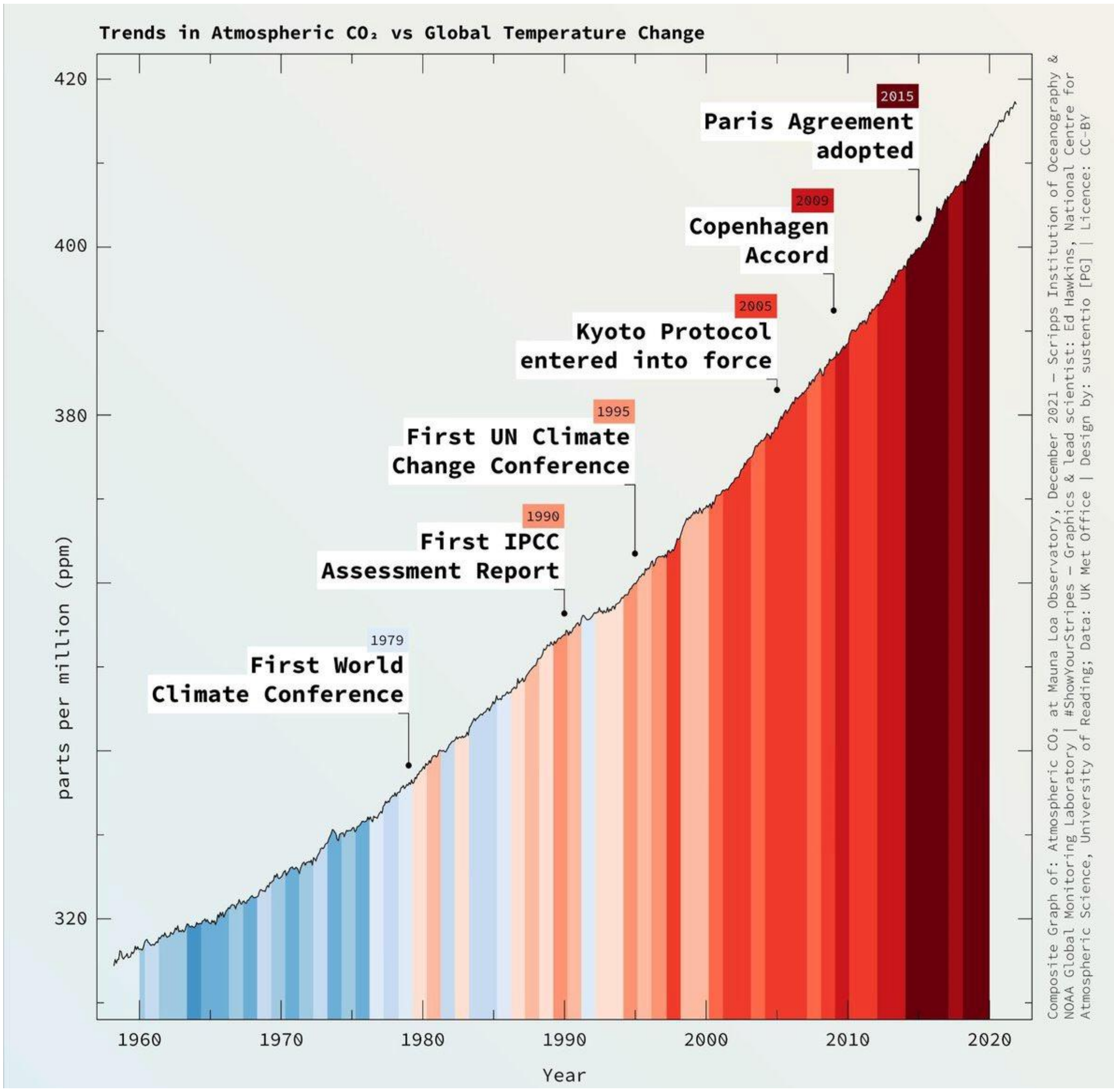
While we have created several innovations[2] and designed policies[3] to effectively address these issues, the fact remains: no solution to the issues presented will be accepted unless non-Black institutions and individuals are positioned to profit from them. Providing any answers to the questions posed would be a futile gesture from a justice and fairness perspective.

[2] See: *The JOBS Act: Crowdfunding Guide to Small Businesses and Startups 2nd Edition*. https://www.amazon.com/dp/B01MT104U1/ref=cm_sw_r_tw_dp_N51QKTHKS32E53HZ251V

[3] See: *Thriving as a Minority-Owned Business in Corporate America: Building a Pathway to Success for Minority Entrepreneurs 1st ed.* https://www.amazon.com/dp/1484272390/ref=cm_sw_r_tw_dp_S19RDNY2TEC17NJZHHQ5

Environmental Factors

The FDIC has not "identified the effects of climate change" and the impediments to a low carbon economy transition that the lax merger policy will impose on society.



APPENDIX A

February 2, 2021

Thomas D. Harris, Deputy Director, Acquisitions Services Branch
FDIC Division of Administration/ASB
Room VS-E-4020
3501 N. Fairfax Drive
Arlington, VA 22226
By email: THarris@fdic.gov

Dear Mr. Harris,

This is a formal appeal of a complaint, under Chapter 5.14 Protests, Claims, Disputes and Appeals, Federal Deposit Insurance Corporation Acquisition Policy Manual (APM) (dated August 2008), for the solicitation listed below. [redacted]

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Signed,

William Michael Cunningham