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Assistant Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street NW
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Re: RIN 3064–ZA31, *Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions*

To Whom It May Concern:

On behalf of the Center for American Progress, we write to comment on the Federal Deposit Insurance Corporation's (FDIC) *Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions* (RFI). The Center for American Progress is an independent, nonpartisan policy institute that is dedicated to improving the lives of all Americans through bold, progressive ideas, as well as strong leadership and concerted action. Our aim is not just to change the conversation, but to change the country.

We greatly appreciate the opportunity to comment on this document. In issuing the RFI, the FDIC rightly recognizes that "[s]ignificant changes over the past several decades in the banking industry and financial system necessitate a review of the regulatory framework that applies to bank merger transactions." We agree "that it is both timely and appropriate to review the regulatory framework and consider whether updates or other changes are warranted.[1]

Over the past half-decade, the Federal banking agencies (FBAs) and the Department of Justice (DOJ) have approved the mergers of E*Trade and Morgan Stanley, BB&T and SunTrust, and PNC and BBVA to create what are now the sixth-, ninth-, and tenth-largest bank holding companies in the United States.[2] Truist (the result of the BB&T/SunTrust

[1] Federal Deposit Insurance Corporation, "Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions," *Federal Register* 87 (62) (2022): 18740-18744, available at https://www.fdic.gov/news/board-matters/2021/2021-12-06-notational-fr.pdf.

[2] *See* Board of Governors of the Federal Reserve System, "Federal Reserve Board announces approval of notice by Morgan Stanley," Press release, Sept. 30, 2020, available at https://www.federalreserve.gov/newsevents/pressreleases/orders20200930b.htm; Board of Governors of the Federal Reserve System, "Federal Reserve Board announces approval of application by BB&T Corporation to merge with SunTrust Banks," Press release, Nov. 19, 2019, available at https://www.federalreserve.gov/newsevents/pressreleases/orders20191119a.htm; Board of Governors of the Federal Reserve System, "Federal Reserve Board announces approval of applications by The PNC Financial Services Group, Inc. and PNC Bancorp, Inc.," Press release, May

merger) is now the largest bank regulated by the FDIC.[3] While these banks' potential impacts on financial stability have increased with their larger footprints, it is unclear what financial services these merged holding companies—with consolidated assets of between $541 billion and $1.1 trillion—can offer that their pre-merger components could not.

Some bank mergers—despite having been approved by regulators and the DOJ—have resulted in lower interest rates paid on deposits, meaning that potential depositors may instead invest in riskier assets in a search for yield or simply may not save for the future.[4] Loans are also fewer, smaller, and higher-priced when banks consolidate, which can stymie small business creation and job growth.[5] When banks become larger, they tend to forgo relationship banking with small businesses and individuals in their communities: They have the deposit base to begin providing loans and other financial services to larger companies than they could previously—and therefore the ability to earn greater returns on each transaction. Further, as lending becomes more automated and requires additional layers of approval in large banks, small businesses may require more individualized underwriting than large banks can provide. The consequences are significant: The merger of community banks with regionals or nationals can result in slowing small business formation, commercial real estate development, and new construction, as well as in increasing unemployment and income inequality.[6]

These outcomes are severely problematic. Unfortunately, it appears that no systematic study of the effects of bank mergers has been completed to evaluate the success or failure of the merger guidelines. Accordingly, we recommend the FBAs conduct, to the extent possible, empirical historical reviews on the effects of past mergers to support future merger decisions. Data should be gathered to support evaluations of future merger submissions and the results of these evaluations should be made public. Further,

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14, 2021, available at https://www.federalreserve.gov/newsevents/pressreleases/orders20210514a.htm.

[3] Federal Reserve Statistical Release, "Insured U.S.-Chartered Commercial Banks That Have Consolidated Assets of $300 Million or More, Ranked by Consolidated Assets, As of December 31, 2021," available at https://www.federalreserve.gov/releases/lbr/current/ (last accessed May 2022).

[4] *See* Robin A. Prager and Timothy H. Hannan, "Do Substantial Horizontal Mergers Generate Significant Price Effects? Evidence from the Banking Industry," *The Journal of Industrial Economics* 46 (4) (2003): 433-452, available at https://onlinelibrary.wiley.com/doi/epdf/10.1111/1467-6451.00082.

[5] *See* Allen N. Berger and others, "The Effects of Bank Mergers and Acquisitions on Small Business Lending," *Journal of Financial Economics* 50 (2) (1998): 187-229, available at https://www.sciencedirect.com/science/article/pii/S0304405X98000361; Steven G. Craig and Pauline Hardee, "The Impact of Bank Consolidation on Small Business Credit Availability," *Journal of Banking & Finance* 31 (4) (2007): 1237-1263, available at https://www.sciencedirect.com/science/article/abs/pii/S0378426606002883; Paola Sapienza, "The Effects of Banking Mergers on Loan Contracts," *The Journal of Finance* 57 (1) (2002): 329-367, available at https://onlinelibrary.wiley.com/doi/abs/10.1111/1540-6261.00424; Mark J. Garmaise and Tobias J. Moskowitz, "Bank Mergers and Crime: The Real and Social Effects of Credit Market Competition," *Journal of Finance* 61 (2) (2006): 495-538, available at https://www.nber.org/papers/w11006.

[6] *See* Bill Francis and others, "Bank Consolidation and New Business Formation," *Journal of Banking & Finance* 32 (8) (2008): 1598-1612, available at https://www.sciencedirect.com/science/article/abs/pii/S0378426607003718; Garmaise and Moskowitz, "Bank Mergers and Crime: The Real and Social Effects of Credit Market Competition."

independent academics should be given access to the relevant data (with appropriate protections) to continue studying the effects of mergers.

Beyond impairing the services that banks are intended to provide, mergers of large banks can also create domestic and global systemically important banks (D- and G-SIBs), the failure of which could cause significant harm to the nation's banking system, capital markets, payments infrastructure, and real economy. Accordingly, the only means of preventing this harm may be for regulators or Congress to bail-out failing SIBs, which, in turn, helps them receive too-big-to-fail subsidies from the market in terms of low costs of capital and helps them to grow at a faster rate than their non-SIB competitors. Further, Acting Comptroller Michael Hsu recently noted that "if a large regional bank were to fail today, the only viable option would be to sell it to one of the G-SIBs," making a SIB even larger—and further decreasing competition.[7]

For that reason, we believe the FDIC should weigh in on every bank merger adjudicated by the Office of the Comptroller of the Currency (OCC) and Federal Reserve Board—including those that involve existing large regional banks or would create new ones. The FDIC will be required to resolve any merged institution if it fails and may have insight into mergers' consequences for the stability of the financial system.

In addition to our recommendations that the FBAs conduct a quantitative study of the effects of the current bank merger guidelines and that the FDIC weigh in on every bank merger, below are our answers to questions the RFI poses.

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?

Enacted in 2010, the Dodd-Frank Act amended the Bank Merger Act to require the FBAs consider a potential merger's "risk to the stability of the United States banking or financial system."[8] For the FDIC, the agency's existing *Statement of Policy on Bank Merger Transactions* (Statement of Policy) does not include any mention of financial stability.[9] Its Application Procedures Manual explains that "Case Managers should consider both quantitative and qualitative metrics when evaluating a transaction's impact on financial stability" and provides "a non-exhaustive list of quantitative metrics for Case Managers to consider."[10] Clearly, the Statement of Policy should be updated. Similarly, in its regulations governing its consideration of mergers, the OCC at least notes that "[t]he OCC

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[7] Michael J. Hsu, "Remarks before the Wharton Financial Regulation Conference, Financial Stability and Large Bank Resolvability," Office of the Comptroller of the Currency, Apr. 1, 2022, available at https://occ.gov/news-issuances/speeches/2022/pub-speech-2022-33.pdf.

[8] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 203, 111th Cong., 2nd sess. (July 21, 2010), Sec. 604, available at https://www.govinfo.gov/content/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf.

[9] Federal Deposit Insurance Corporation, "FDIC Statement of Policy on Bank Merger Transactions," available at https://www.fdic.gov/regulations/laws/rules/5000-1200.html (last accessed May 2022).

[10] Federal Deposit Insurance Corporation, "Application Procedures Manual: Mergers," p. 22, available at https://www.fdic.gov/regulations/applications/resources/apps-proc-manual/section-04-mergers.pdf (last accessed May 2022).

considers the risk to the stability of the United States banking and financial system."[11] and its Comptroller's Licensing Manual provides six financial stability factors for consideration.[12] For the Federal Reserve, although the agency has developed a framework in which it considers a resulting firm's size, interconnectedness, complexity and other factors and can deny a merger if it concludes the merged bank would pose a threat to the economy on financial stability grounds,[13] its framework is lacking as the Fed has not explained how it analyzes the data it collects or whether it considers some metrics more important than others.[14]

Some experts have characterized the Federal Reserve's financial stability framework as "lack[ing] clarity and analytical rigor"[15] and "analytically underdeveloped,"[16] and the FDIC's and OCC's frameworks deserve the same characterization. For example, former Governor Daniel Tarullo has argued that the Fed's approval of Morgan Stanley's acquisition of E*Trade "contained only a perfunctory analysis" regarding financial stability, as it provided little reasoning for why the acquisition would not lead to greater financial stability risks and did not explain why the resulting 2 percent increase in Morgan Stanley's G-SIB score was acceptable to regulators.[17]

Additionally, the FBAs have not defined any upper limit on mergers resulting in an institution large enough to be a risk to financial stability and have not denied a merger on financial stability grounds;[18] instead, regulators have recently approved mergers of E*Trade and Morgan Stanley, BB&T and SunTrust, and PNC and BBVA to create what are now the sixth-, ninth-, and tenth-largest bank holding companies in the United States.[19]

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[11] Legal Information Institute, "12 CFR § 5.33 - Business combinations involving a national bank or Federal savings association," available at https://www.law.cornell.edu/cfr/text/12/5.33 (last accessed May 2022).

[12] Office of the Comptroller of the Currency, "Comptroller's Licensing Manual: Business Combinations," July 2018, available at https://occ.gov/publications-and-resources/publications/comptrollers-licensing-manual/files/bizcombo.pdf.

[13] *See* Federal Reserve Board, "Capital One Financial Corporation," *Federal Reserve Bulletin* 93 (2007), available at https://www.federalreserve.gov/pubs/bulletin/2007/legal/q406/order2.htm. We note there is a problem with the Fed articulating this framework only in an opinion approving a specific merger, rather than through guidance or through a notice-and-comment rulemaking. Although one author to this letter is on the record as supporting policymaking through adjudication, the Fed should articulate its framework in its own separate document. *See* Todd Phillips, "A Change of Policy: Promoting Agency Policymaking by Adjudication," *Administrative Law Journal* 73 (3) (2021): 495-551, available at https://administrativelawreview.org/wp-content/uploads/sites/2/2021/10/73.3-Phillips_Final.pdf.

[14] Jeremy C. Kress, "Modernizing Bank Merger Review," *Yale Journal on Regulation* 37 (2) (2020): 435-498, p. 469-70, available at https://www.yalejreg.com/print/modernizing-bank-merger-review/.

[15] Ibid, p. 470.

[16] Daniel K. Tarullo, "Regulators should rethink the way they assess bank mergers," Brookings Institution, March 16, 2022, available at https://www.brookings.edu/opinions/regulators-should-rethink-the-way-they-assess-bank-mergers/.

[17] Ibid.

[18] Kress, "Modernizing Bank Merger Review," p. 470.

[19] Board of Governors of the Federal Reserve System, "Federal Reserve Board announces approval of notice by Morgan Stanley"; Board of Governors of the Federal Reserve System, "Federal Reserve Board announces approval of application by BB&T Corporation to merge with SunTrust Banks";

This is despite the fact that one of the main lessons from the Global Financial Crisis is that the existence of Too Big To Fail financial institutions poses a risk to financial stability.[20] For example, a 2018 Federal Reserve study found that the economy would experience more harm due to the failure of a single large bank compared to the failure of five smaller banks with a combined total of deposits equal to that of the larger bank.[21]

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?

We recommend that the FBAs adopt a rebuttable presumption of denial for mergers of banks with more than $100 billion in assets[22] or if the newly merged institution would have more than $100 billion in assets, indexed to inflation. Without doubt, any proposed merger involving a D- or G-SIB should be subject to a presumptive denial, a policy that former Governor Tarullo argued in favor of in 2012.[23] A presumption of denial does not need to be dispositive, but it would require banks and regulators to more thoroughly examine the potential economic harm that could occur if the post-merger firm were to fail. Also, the FBAs should consider at what level could a merged bank be adequately put through bankruptcy without affecting financial stability, as expected by Title I of Dodd-Frank.

In terms of metrics, the FBAs should consider using one or more recently developed quantitative measures that appraise a bank's systemic importance, including SRISK, CoVaR, and Basel Committee on Bank Supervision (BCBS) systemic risk score.[24] Some of these metrics are already used by regulators; for example, the Fed uses BCBS scores to assign risk-based capital requirements to the largest banks. As argued by Professor Jeremy Kress, the FBAs could presumptively deny mergers that lead to a significant change in one of these measures.[25] Additionally, the FBAs should presumptively deny mergers if the banks' leverage and risk-based capital levels, both pre- and post-merger, are not comfortably above the standards needed to pass various stress tests (e.g., the

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Board of Governors of the Federal Reserve System, "Federal Reserve Board announces approval of applications by The PNC Financial Services Group, Inc. and PNC Bancorp, Inc."

[20] Financial Stability Board, "Ending too-big-to-fail," available at https://www.fsb.org/work-of-the-fsb/market-and-institutional-resilience/post-2008-financial-crisis-reforms/ending-too-big-to-fail/ (last accessed May 2022).

[21] Amy G. Lorenc and Jeffery Y. Zhang, "The Differential Impact of Bank Size on Systemic Risk" (Washington: Board of Governors of the Federal Reserve System, 2018), available at https://www.federalreserve.gov/econres/feds/files/2018066pap.pdf.

[22] Federal Financial Institutions Examination Council, "Large Holding Companies," available at https://www.ffiec.gov/npw/Institution/TopHoldings (last accessed May 2022).

[23] Daniel K. Tarullo, "Financial Stability Regulation," Board of Governors of the Federal Reserve System, October 10, 2012, available at https://www.federalreserve.gov/newsevents/speech/tarullo20121010a.htm.

[24] *See* Kress, "Modernizing Bank Merger Review," p. 472.

[25] Ibid, p. 473.

Dodd-Frank Act Stress Tests, the Federal Reserve's Comprehensive Capital Analysis and Review).

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)?

The FBAs must fully take into consideration the health of the individual financial institutions when deciding whether to approve mergers, as it is important that regulators do not permit mergers that result in larger, more systemically risky institutions that are more likely to fail than their component institutions. For this reason, when Congress permitted interstate bank mergers in the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, it required that mergers be approved only if "the resulting bank will be well capitalized and well managed upon the consummation of the transaction."[26]

The FBAs must develop and adhere to bright line standards for determining whether merged banks will be both well managed and well capitalized. Currently, the FDIC's Statement of Policy merely explains that "the FDIC normally will not approve a proposed merger transaction where the resulting institution would fail to meet existing capital standards, continue with weak or unsatisfactory management, or whose earnings prospects, both in terms of quantity and quality, are weak, suspect, or doubtful."[27] Not only is "fail[ing] to meet existing capital standards" or having "weak or unsatisfactory management" not the same as being well capitalized and well managed, it also does not explain how the FDIC will determine whether a bank is well capitalized and well managed.

In developing bright line standards, we think that the FDIC should look to its definition of "well capitalized" in 12 CFR § 324.403 and "well-managed" in 12 CFR § 362.17, as it is important that the FDIC have consistent definitions throughout its various regulatory activities (the OCC and Federal Reserve should have consistency in their regulations as well). Although we do not wish to weigh in on the appropriateness of the levels in the definition of "well capitalized" in section 324.403, we believe that the definition of "well capitalized" should be substantially higher than that of "adequately capitalized." However, we do believe that the term "well managed" in section 362.17 is inappropriately lenient. That section states that an institution is "well managed" if it "has received a composite rating of 1 or 2 … and at least a rating of 2 for management." However, the UFIRS provides that "[a] rating of 2 [for the management component] indicates satisfactory management and board performance and risk management practices," and "satisfactory" is not the same as "well managed" as required by statute.[28] We believe that, in order for a merger to be approved, both banks must have (1) a management rating of 1; (2) a composite CAMELS rating of 1; and (3) a 1 or 2 on each non-capital component.

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[26] Legal Information Institute, "12 U.S. Code § 1831u - Interstate bank mergers," available at https://www.law.cornell.edu/uscode/text/12/1831u (last accessed May 2022).
[27] Federal Deposit Insurance Corporation, "FDIC Statement of Policy on Bank Merger Transactions."
[28] Federal Financial Institutions Examination Council, "Uniform Financial Institutions Rating System," *Federal Register* 61 (245) (1996): 67021-67029, available at https://www.govinfo.gov/content/pkg/FR-1996-12-19/pdf/96-32174.pdf.

For those banks that are subject to stress tests (e.g., the Dodd-Frank Act Stress Tests, the Federal Reserve's Comprehensive Capital Analysis and Review), we believe that both banks should be comfortably within stress test standards pre-merger, and the merged institution should be comfortably within stress test standards post-merger.

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?

The Bank Merger Act requires that "[i]n every case, the responsible agency shall take into consideration . . . the convenience and needs of the community to be served."[29] But in recent decades, the FBAs have placed insufficient emphasis on this factor—especially compared to evaluations of competitive effects—despite significant evidence that bank mergers can have negative effects on consumers and communities, including through branch closures,[30] lower availability of lending to small businesses,[31] and especially negative impacts on LMI communities.[32] The convenience and needs factor is included in the Bank Merger Act because Congress appropriately recognized the unique role that the banking industry plays in the economy and in providing essential services to communities. Regulators must thoroughly examine the potential community effects of every proposed merger, particularly with a focus on keeping branches open and avoiding the creation of new banking deserts.

Scholars have found that the convenience and needs standard is not being appropriately addressed in the evaluation of most bank mergers today, with the FBAs placing most of the emphasis on reviewing potential competitive effects. In the past, the FBAs explicitly

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[29] Legal Information Institute, "12 U.S. Code § 1828 - Regulations governing insured depository institutions," available at https://www.law.cornell.edu/uscode/text/12/1828 (last accessed May 2022).

[30] *See* Hoai-Luu Q. Nguyen, "Are Credit Markets Still Local? Evidence from Bank Branch Closings," *American Economic Journal: Applied Economics* 11 (1) (2019): 1-32, available at https://www.aeaweb.org/articles?id=10.1257/app.20170543; Lydia DePillis, "The internet didn't kill bank branches. Bank mergers did," *The Washington Post*, July 9, 2013, available at https://www.washingtonpost.com/news/wonk/wp/2013/07/09/the-internet-didnt-kill-bank-branches-bank-mergers-did/.

[31] *See*, e.g., Berger and others, "The Effects of Bank Mergers and Acquisitions on Small Business Lending"; Craig and Hardee, "The Impact of Bank Consolidation on Small Business Credit Availability"; Sapienza, "The Effects of Banking Mergers on Loan Contracts."

[32] *See* Rohit Chopra and Jeremy Kress, "RE: Bank Merger Competitive Review," Federal Trade Commission, October 16, 2020, p. 2-3, available at https://www.ftc.gov/system/files/documents/public_statements/1581730/chopra_-_comment_doj_banking_merger_guidelines.pdf.

denied mergers on the grounds that they did not affirmatively benefit the public.[33] Presently, however, the FBAs generally treat this standard as an "afterthought," rarely mentioning convenience and needs in their justifications[34] and performing only "perfunctory" public interest analyses.[35] Evidence also suggests that the FBAs have even considered potential benefits to the companies themselves (such as increased profits) as being in the public interest.[36] Additionally, since the passage of the Community Reinvestment Act in 1977, the agencies have essentially used banks' scores on CRA assessments as a "rubber stamp for meeting the public benefit test," with "no inquiry as to the benefits of the merger."[37] Since CRA scores only evaluate banks' past performances, this leaves out a much-needed evaluation of the potential future public benefits of a merger.

The FBAs' current reliance on institutions' CRA performance evaluation record is problematic. The FBAs often make a CRA rating dispositive in their public interest considerations, meaning that if they deem a bank's overall CRA rating to be sufficient—typically through an overall score of Satisfactory—that will be the primary or sole determination in whether the merger meets the convenience and needs factor.[38] At the same time, the FBAs will generally accept overall Satisfactory scores even if a bank scores below Satisfactory on one of the performance test categories. In recent years, the agencies have even signaled that they might accept mergers from banks that score less than satisfactory on the overall score.[39] This essentially incentivizes banks to do the bare minimum to achieve overall satisfactory scores on their CRA exams—with negative consequences for LMI communities who would benefit from more banks engaging in better community reinvestment.[40]

The FBAs can improve upon their current reliance on CRA ratings for meeting the Bank Merger Act's statutory requirement to consider the convenience and needs of communities in several ways. First, given the evidence of harms to the public resulting from mergers due to branch closures, increased cost of services, and reduced access to credit,[41] the agencies should establish a presumption that proposed mergers do not benefit the public and require banks to provide quantifiable estimates as to how proposed mergers will impact their communities. At minimum, the FBAs should actively consider both the potential benefits and harms of mergers, yet the FDIC's Statement of Policy encourages the consideration of a merger's benefits but not harms when it states "[i]n assessing the convenience and needs of the community to be served, the FDIC will

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33 Kress, "Modernizing Bank Merger Review," p. 478.
34 Ibid, p. 479.
35 Ibid, p. 441.
36 Mehrsa Baradaran, "Banking and the Social Contract," *Notre Dame Law Review* 89 (3) (2014): 1283-1342, available at https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1788&context=ndlr, p. 1338-9.
37 Ibid, p. 1339-40.
38 Kress, "Modernizing Bank Merger Review," p. 488-489.
39 Ibid, p. 489-490.
40 Ibid, p. 490.
41 *See* Andres Vinelli, Andy Green, and Gregg Gelzinis, "Re: DOJ Antitrust Division Bank Merger Guidelines Review," Center for American Progress, October 30, 2020, p. 1-3, available at https://www.justice.gov/atr/page/file/1334441/download.

consider such elements as the extent to which the proposed merger transaction is likely to benefit the general public."[42]

Second, the FBAs should raise the standards by which they use CRA assessment scores to approve bank mergers. This could involve a presumption of denial of mergers for banks that have not received at least an Outstanding overall score and at least a Satisfactory rating on each individual component of their CRA assessments. If the CRA is to have any teeth as a requirement for banks to invest in communities, particularly LMI communities, then banks' CRA performances must be held to a higher standard during the merger review process than they are currently. A presumption of denial absent an overall CRA score of Outstanding would create a much greater incentive for banks to do more than the minimum required to fulfill their CRA requirements.

Finally, the FBAs should look at the markets for specific product lines being offered by banks—such as residential mortgages, personal and small business loans, and digital payments services[43]—and whether the merger of two institutions would negatively affect the community's access to those products, particularly with regard to those products traditionally used by or benefitting traditionally underserved individuals and entities. A merger could lead to differential effects on competition for different types of products, with some products becoming less available. For example, studies have demonstrated that community banks are more likely to offer loans to small businesses than larger entities, and the merger of two community banks could leave a market without access to those types of loans,[44] and customers with limited internet access may not be able to benefit from competition from nonbanks.[45] Accordingly, the FBAs should have a clear understanding of whether a newly merged institution would alter the price and/or availability of many types of financial services or products when evaluating whether a merger serves the convenience and needs of the community. At minimum, we encourage regulators to look at a merger's effects on (1) individual depository accounts; (2) consumer loans; (3) small business loans; (4) mid-sized business loans; and (5) large business loans.

In addition to further efforts the FBAs can take to improve their convenience and needs evaluations, we believe the Consumer Financial Protection Bureau (CFPB) should weigh in on every bank merger involving institutions it examines or mergers that would create a CFPB-examined bank (i.e., banks with more than $10 billion in assets). Although the bank merger statutes do not explicitly require a consideration of consumer compliance in evaluating bank mergers, the FBAs have historically done so and have even denied some mergers on consumer compliance grounds.[46] In recent years, however, scholars note that consumer compliance has "effectively evaporated as a constraint on bank mergers," and the creation of the CFPB by the Dodd-Frank Act has meant that the FBAs are not significantly engaged on consumer compliance issues for many banks, whereas the CFPB has the expertise and examination data to evaluate whether merging banks have properly

[42] Federal Deposit Insurance Corporation, "FDIC Statement of Policy on Bank Merger Transactions."
[43] Tarullo, "Regulators should rethink the way they assess bank mergers."
[44] *See*, *e.g.*, Berger and others, "The Effects of Bank Mergers and Acquisitions on Small Business Lending"; Craig and Hardee, "The Impact of Bank Consolidation on Small Business Credit Availability"; Sapienza, "The Effects of Banking Mergers on Loan Contracts."
[45] *See* Tarullo, "Regulators should rethink the way they assess bank mergers."
[46] Kress, "Modernizing Bank Merger Review," p. 483-484.

complied with consumer financial protection laws.[47] Compliance with these laws is essential to serving the convenience and needs of the community, and the FBAs should consult the CFPB on mergers.

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?

As discussed in our answer to Question 4, the FBAs would benefit from a more granular understanding of the competitive effects of a merger beyond what the Herfindahl-Hirschman Index (HHI) metric indicates. This is especially important because banks offer a wide variety of products and services across different scales of markets. HHI, which Acting Comptroller of the Currency Michael Hsu recently described as a "blunt tool," is measured for bank concentration at the local market level using deposit activity.[48] This means that the score does not necessarily capture the potential effects of a merger on individual product lines or services.[49] For example, the change in HHI resulting from a large national bank acquiring a smaller regional bank may not appropriately indicate the change in lending to small businesses in the region served by the smaller bank. Accordingly, we recommend that the FBAs develop an HHI-style metric that measures concentration across individual product lines and markets. Such a metric would allow the FBAs to better understand both the potential anticompetitive effects of mergers as well as whether a significant decrease in competition for a given product—such as personal loans—would fail to meet the convenience and needs of the community.

The FBAs should also consider using CRA examination scores in a more nuanced manner. If the FBAs only uses the merging banks' most recent CRA scores when evaluating merger proposals, it may not capture the banks' longer-term CRA records, particularly if the banks only recently complied adequately with the statute's requirements. Given the importance of the bank merger review process in the FBAs' enforcement of the CRA, the FBAs should view with more skepticism a proposed merger involving, for example, a bank that recently received a Satisfactory rating but had for several years prior received less-than-satisfactory ratings. One way to address this would be for the FBAs to use a moving average of banks' CRA scores to capture a fuller record of compliance over time. Although there have been problems with CRA evaluations (see the response to Question 4, *supra*), with the FBAs recently proposing a significant modernization of the CRA assessment process,[50] using a moving average may help supplement the more accurate scoring that will hopefully result from this change.

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[47] Ibid, p. 484-485.

[48] Michael Hsu, "Remarks at Brookings: 'Bank Mergers and Industry Resiliency,'" Office of the Comptroller of the Currency, May 9, 2022, available at https://occ.gov/news-issuances/speeches/2022/pub-speech-2022-49.pdf.

[49] Tarullo, "Regulators should rethink the way they assess bank mergers."

[50] Office of the Comptroller of the Currency and others, "Community Reinvestment Act," May 5, 2022, available at https://www.federalreserve.gov/consumerscommunities/files/cra-npr-fr-notice-20220505.pdf.

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

Although the FBAs may wish to consider the extent to which merging parties do not compete at the time of the merger, they should not place great weight on that fact. One party that currently operates in a limited market could, sometime in the future, expand and compete with the other party. Permitting a merger between two future competitors could stymie future competition.

This is a phenomenon recognized six decades ago by the Supreme Court. In the seminal case *Brown Shoe Co. v. United States*, the Court noted that mergers that "foreclose[e] the competitors of either party from a segment of the market otherwise open to them…may act as a 'clog on competition,' which 'deprive[s]…rivals of a fair opportunity to compete.'"[51] In a subsequent case, the Supreme Court explained that when a market participant "merely stays near the edge" of a market (i.e., not yet entering but having the capacity to do so if it chooses) "it is a deterrent to current competitors."[52] Congressional investigators have recently found that such anticompetitive activities are not simply theoretical; for example, a report by the House Subcommittee on Antitrust noted that in private emails, a senior Facebook executive "described its acquisition strategy as a 'land grab' to 'shore up' Facebook's position" and its Chief Executive explained that "Facebook 'can likely always just buy any competitive startups.'"[53]

In banking, such anticompetitive activities can occur, for example, when a large bank buys a smaller competitor that has developed innovative technology. Rather than allowing a small bank to fully deploy technology to allow it to better reach a new market segment in which the large bank currently operates or lease its new technology to many competitors of the large bank, the large bank can simply buy the competitor and its technology.

(b) – (g)

No response.

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?

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[51] Brown Shoe Co. v. United States, 370 U.S. 294, 323-324 (1962), available at https://supreme.justia.com/cases/federal/us/370/294/ quoting Standard Oil Co. of California v. United States, 337 U.S. 293, 314 (1949), available at https://supreme.justia.com/cases/federal/us/337/293/ and H. R. Rep. No. 1191, 81st Cong., 1st Sess. 8.

[52] Ford Motor Co. v. United States, 405 U.S. 562, 567 (1972), available at https://supreme.justia.com/cases/federal/us/405/562/ (quoting United States v. Ford Motor Co., 286 F. Supp. 407, 441 (E.D. Mich. 1968)).

[53] House Subcommittee on Antitrust, Commercial and Administrative Law, "Investigation of Competition in Digital Markets" (Washington: House Committee on the Judiciary, 2020), available at https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

There is little question that the existing merger regulatory framework—in terms of the FDIC's Statement of Policy, the OCC's and Federal Reserve's rules, and the ways they have been implemented by regulators—creates an implicit presumption of approval. Given the stakes involved in bank mergers, the FBAs must work to counteract this presumption so that banks seeking to merge and regulators evaluating mergers do not simply go through the motions but instead engage in a comprehensive process as required by the law.

The most significant factor contributing to this implicit presumption is the results of its application; in recent years, the FBAs have been approving mergers at extremely high rates. For example, between 2014 and 2018, the Federal Reserve approved over 90 percent of applications, and it has not formally denied a single application in several years[54]—in sharp contrast to a more routine use of denials in the initial decades following passage of the Bank Merger Act.[55] Although it is true that banks have informal conversations with regulators prior to submitting formal merger applications—a process that ensures mergers unlikely to succeed are never filed—the fact that so few formal applications are denied in recent years undoubtedly sends a message that regulators are unlikely to stop a merger request today.

Putting its application aside, the existing regulatory framework facially creates an implicit presumption of approval. The 1995 Bank Merger Competitive Review guidelines used by the banking agencies and the DOJ establish that if the post-merger HHI does not exceed 1800 and increase by 200 (i.e., an 1800/200 threshold), the agencies are unlikely to review the competitive effects of the merger any further.[56] This screening standard is too lax,[57] permitting mergers that might still have anticompetitive effects. It also fails to take into account developments in the banking industry that suggest HHI does not sufficiently account for the negative effects to consumers stemming from bank consolidation; for example, that prices for financial services and products have increased and availability of credit has decreased due to bank consolidation despite local market HHIs generally not increasing.[58] The fact that few mergers are denied based on this threshold contributes strongly to the *ex ante* presumption of approval.

Further, the FBAs' failure to adequately prioritize evaluations of the public interest factors required by law and instead only engaging in "perfunctory" analyses that focus on advantages to the banks themselves rather than the communities is another contributing factor. According to Professor Jeremy Kress, the FBAs have routinely allowed mergers involving banks with "only marginal consumer compliance and CRA records," despite evidence of harms to consumers resulting from mergers.[59] Specifically, the FBAs' overreliance on CRA scores to satisfy the public interest requirements makes denial on

[54] Kress, "Modernizing Bank Merger Review," p. 456.
[55] Robert M. Adams, "Consolidation and Merger Activity in the United States Banking Industry from 2000 Through 2010," Board of Governors of the Federal Reserve System, FEDS Working Paper No. 2012-51, August 8, 2012, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2193886.
[56] Department of Justice, "Bank Merger Competitive Review -- Introduction and Overview" (Washington: 1995), available at https://www.justice.gov/atr/bank-merger-competitive-review-introduction-and-overview-1995.
[57] Chopra and Kress, "RE: Bank Merger Competitive Review."
[58] Kress, "Modernizing Bank Merger Review," p. 464-465.
[59] Ibid, p. 475-476.

these grounds much less likely, given evidence of CRA grade inflation[60] and the practice of banks doing the bare minimum to achieve overall Satisfactory scores (see the response to Question 4, *supra*).[61]

The FBAs should address this implicit presumption in the following ways: First, they and the DOJ should lower the HHI threshold for review of competitive effects of mergers to 1500. The Horizontal Merger Guidelines promulgated by the DOJ and the Federal Trade Commission (FTC) provide that unconcentrated markets are those with an "HHI below 1500."[62] Accordingly, we encourage the FBAs to lower their review threshold to any merger that would push the HHI above 1500 and increases it at all (i.e., a 1500/1 threshold). Second, they should introduce much greater transparency into the process by which it interacts with banks, such as by creating public records of informal conversations preceding merger reviews and by limiting the process by which banks are allowed to withdraw and resubmit applications. Doing so would generate greater public scrutiny around potential mergers and create a more formalized public record of the process, giving interested parties more ability to evaluate and comment on proposals and reducing the perception that regulators are highly likely to approve requests. Finally, introducing more bright line standards throughout the review process, such as those articulated in response to Question 3, *supra*, would make the process more comprehensive, especially if those standards represent more stringent requirements than analyses currently used.

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?

As articulated in the response to Question 7, the existing merger framework—facially and as applied—create an implicit presumption that merger applications will be approved so long as the public interest is minimally benefitted. This presumption is, however, contrary to that articulated in the Bank Merger Act, which requires that mergers that "would be in restraint of trade" be blocked "unless [the regulator] finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest."[63]

The FBAs should flip their presumptions in order to put a higher burden of proof on applicants to demonstrate that their proposed mergers' public interest benefits outweigh any "anticompetitive effects."[64] Because all mergers result in a some restraint of trade—even the acquisition of an entity that is not currently a competitor but could become one

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[60] *See* Rohit Chopra, "Statement of CFPB Director Rohit Chopra, FDIC Board Member, on the Notice of Proposed Rulemaking Regarding the Community Reinvestment Act," Consumer Financial Protection Bureau, May 5, 2022, available at https://www.consumerfinance.gov/about-us/newsroom/statement-of-cfpb-director-rohit-chopra-fdic-board-member-on-the-notice-of-proposed-rulemaking-regarding-the-community-reinvestment-act/.
[61] Kress, "Modernizing Bank Merger Review," p. 490.
[62] Department of Justice, "Horizontal Merger Guidelines," August 19, 2010, available at https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.
[63] Legal Information Institute, "12 U.S. Code § 1828 - Regulations governing insured depository institutions," available at https://www.law.cornell.edu/uscode/text/12/1828 (last accessed May 2022).
[64] Ibid.

in the future limits potential competition[65]—the onus should be on the merging banks to demonstrate that the probable effect of the transaction will be to meet the convenience and needs of the communities. If merging banks cannot sufficiently prove to regulators through quantitative, measurable standards (e.g., estimated numbers of bank closures or effects on prices of services) that the public interest outweighs anticompetitive effects, then regulators should not approve the mergers.

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?

The Bank Merger Act rightfully provides a systemic risk exception that allows the FBAs to approve the purchase and assumption of a failing bank to ensure the stability of the banking and financial systems. We believe that it is important for the FBAs to have the ability to use this exception in times of crisis. However, we hope this exception is never used and encourage the FBAs to use their regulatory and examination authorities to ensure that banks never get into positions in which the exception would be necessary. Accordingly, when the FBAs approve mergers (whether using the systemic risk exception or otherwise) that would create bank of significant size as to otherwise be required to be sold to an existing D- or G-SIB in a time of crisis, it is imperative that the FBA requires the merged institutions to (1) create resolution plans on a periodic basis utilizing a single point of entry resolution strategy that is approved by the FDIC; (2) have separable business lines to facilitate resolution; and (3) have sufficient total loss-absorbing capacity to withstand downturns.

We recognize that the FBAs may be hesitant to condition mergers on these requirements; however, the DOJ and FTC frequently condition mergers on divesting business lines or complying with other obligations,[66] and we believe that the FBAs can similarly condition bank mergers. Additionally, the FDIC may impose such obligations by regulation using its authority under sections 11 and 13 of the Federal Deposit Insurance Act.[67]

[65] *See* Ford Motor Co. v. United States, 405 U.S. 562 (1972).
[66] *See*, *e.g.*, Bureau of Competition, "Negotiating Merger Remedies" (Washington: Federal Trade Commission, 2012), available at https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf.
[67] Legal Information Institute, "12 U.S. Code § 1821 - Insurance Funds," available at https://www.law.cornell.edu/uscode/text/12/1821 (last accessed May 2022); Legal Information Institute, "12 U.S. Code § 1823 - Corporation monies," available at https://www.law.cornell.edu/uscode/text/12/1823 (last accessed May 2022).

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?

There should be no difference in how the FDIC considers merger transactions for small banks compared to large banks. The FDIC should apply the same standards in its merger review process involving small banks. It is just as important, for example, that the FDIC evaluate the potential impact on communities from the merger of small banks, which could result in branch closures and reduced quality of services that may particularly harm a local community.

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Thank you again for the opportunity to comment on the RFI. We would be pleased to answer any additional questions you may have.

Sincerely,

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