May 31, 2022

Chair Martin Gruenberg
Board Members
Federal Deposit Insurance Corp.
550 17th St NW
Washington, D.C. 20429

Via email: comments@fdic.gov

Request for Comment on Rules, Regulations, Guidance, and Statement of Policy on Bank Merger Transactions, RIN 3064–ZA31

Dear officers,

On behalf of more than 500,000 members and supporters of Public Citizen, we provide the following comment in response to Federal Deposit Insurance Corp's (FDIC) "Request for Comment on Rules, Regulations, Guidance, and Statement of Policy on Bank Merger Transactions."

We welcome this important review in the context of a remarkable record: Regulators have approved more than 3,500 consecutive merger applications. Not one formal application has been denied during this 15-year period.[1]

Moreover, this industry has changed dramatically, in no small part because of this inattention to merger policy. Consolidation in the last three decades has led to a decline in the number of banks, from more than 12,000 in 1990, to 4,236 by the end of 2021.[2] The size of the largest banks has swollen. In 1990, only one bank held assets of more than $100 billion. By 2020, 33 institutions were larger than this.[3] These banks

[1] Jeremy Kress, *Modernizing Bank Merger Review,* YALE JOURNAL OF REGULATION (2020) https://openyls.law.yale.edu/bitstream/handle/20.500.13051/8305/Kress_Article._Publication__1_.pdf?sequence=2&isAllowed=y

[2] Federal Deposit Insurance Corp, *Institution View,* FEDERAL DEPOSIT INSURANCE CORP (website visited May 17, 2022) https://banks.data.fdic.gov/explore/historical?displayFields=STNAME%2CTOTAL%2CBRANCHES%2CNew_Char&selectedEndDate=2021&selectedReport=CBS&selectedStartDate=1934&selectedStates=0&sortField=YEAR&sortOrder=desc

[3] Federal Deposit Insurance Corp, *Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transaction,* FEDERAL REGISTER (March 31, 2022) *https://www.fdic.gov/news/board-matters/2021/2021-12-06-notational-fr.pdf*

hold more than 70 percent of total industry assets. [4] Four banks hold more than $2 trillion each in assets and account for nearly half of all industry assets.[5]

Merger policy that created these financial giants helped lead to the financial crash of 2008 as executives tacitly worked under the moral hazard that in the event of reckless, even fraudulent risk-taking, they'd be bailed out by taxpayers—their banks were "too big to fail." Indeed, lawmakers approved a massive rescue of that flooded the financial sector, from mega-bank bondholders to money market funds.[6] As a result, many banks failed, and some of the largest failures were sold to already giant banks.

The decreasing number of banks and the concentration by the mega-banks has been measurably harmful to consumers. Bank mergers have increased the cost of credit.[7] Small businesses have struggled to find credit amid this persistent wave of mergers.[8] These mergers have also led to an escalation in fees charged to customers.[9] It has depressed the amount of interest that banks pay to depositors.[10] The disappearance of banks has been especially profound in communities of color, leaving these populations vulnerable to high cost lenders, such as payday operators and high-fee check cashing shops.[11]

Mergers do not simply result in fewer competitors, but fewer branches as well. The merger in 2019 between Branch Banking and Trust Company (BB&T) and SunTrust Bank (SunTrust) created the sixth largest bank in the nation, with a combined 2,950 branches. But after the merger, the newly named Truist closed 175 branches and is expected to close a total of 800, according to analysts.[12]

The merger-spawned megabanks have also engaged in massive misconduct, from mortgage fraud to money laundering. Observers such as MIT Prof Simon Johnson, former Citibank CEO John Reed, and former Utah Republican Gov. Jon Huntsman, question whether they are too big to manage, and at Public Citizen we agree.[13]

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[4] Federal Deposit Insurance Corp, *Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transaction,* FEDERAL REGISTER (March 31, 2022) *https://www.fdic.gov/news/board-matters/2021/2021-12-06-notational-fr.pdf*

[5] Bartlett Naylor, *TOO Big,* PUBLIC CITIZEN (2016) https://www.citizen.org/wp-content/uploads/toobig.pdf

[6] Bartlett Naylor, *TOO Big,* PUBLIC CITIZEN (2016) https://www.citizen.org/wp-content/uploads/toobig.pdf

[7] Mark J. Garmaise & Tobias J. Moskowitz, *Bank Mergers and Crime: The Real and Social Effects of Credit Market Competition,* 61 J. FIN. 495, 509-14 (2006). https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1540-6261.2006.00847.x

[8] Mark J. Garmaise & Tobias J. Moskowitz, *Bank Mergers and Crime: The Real and Social Effects of Credit Market Competition,* 61 J. FIN. 495, 509-14 (2006). https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1540-6261.2006.00847.x

[9] Vitaly M. Bord, *Bank Consolidation and Financial Inclusion: The Adverse Effects of Bank Mergers on Depositors,* HARVARD UNIVERSITY (Dec. 1, 2018), https://scholar.harvard.edu/files/vbord/files/vbord_-_bank_consolidation_and_financial_inclusion_full.pdf

[10] Robin A. Prager & Timothy H. Hannan, *Do Substantial Horizontal Mergers Generate Significant Price Effects? Evidence from the Banking Industry,* 46 J. INDUS. ECON. 433, 442-449 (1998) https://onlinelibrary.wiley.com/doi/abs/10.1111/1467-6451.00082

[11] Rohit Chopra, *Comment,* DEPARTMENT OF JUSTICE (website visited Jan. 20, 2022) https://www.justice.gov/atr/page/file/1330326/download

[12] Lauren Sullivan, Ali Shayan Sikander, *Majority Of BB&T, SunTrust Branch Closures Still To Come*, S&P GLOBAL MARKET INTELLIGENCE, (October 5, 2020), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/majority-of-bb-t-suntrust-branch-closures-still-to-come-60511261.

[13] Bartlett Naylor, *TOO Big,* PUBLIC CITIZEN (2016) https://www.citizen.org/wp-content/uploads/toobig.pdf

Meanwhile, details of banking have changed in the last decades. Before the financial crash, banks originated about 75 percent of residential mortgages. Now, mortgage firms independent of banks originate about 70 percent of these mortgage originations.[14] Financial technology means that non-banking firms account for a growing share of business once traditionally operated through banks. The internet means that many customers have less need for bricks-and-mortar banks and bank branches. Internet banking, available since 2000, is the option of choice by more than 65 percent of patrons.[15] At the same time, physical branches remain useful, often essential for those without technological advantages. .

FDIC Governance

The FDIC governs mergers under the Bank Mergers Act.[16],[17] This requires the prior written approval of the FDIC before any insured depository institution may engage in a merger. To consent to a merger, the FDIC must consider three factors: Financial stability; the public interest; and managerial considerations.

Given the colossal failures of mega-banks during the financial crisis, regulators must pay special attention to financial stability in considering mergers. Acting Comptroller Michael Hsu boiled the issue down to a simple question: if a merger created a large regional bank, how would its failure be resolved. "If the answer is: It would have to be sold to one of the four megabanks, then, I would posit, we have a financial stability problem."[18]

The agencies should establish a metric that measures whether stress or failure of firms subject to a merger proposal would lead to systemic risk. Scholar Jeremy Kress reviews several potential metrics, including SRISK, which measures expected capital shortfalls; Conditional Value-at Risk (CoVaR), which quantifies how failure at one firm increases the riskiness of the broader financial system; and a Basel Committee on Bank Supervision (BCBS) formula that computes a firm's "systemic risk score based on a its size, complexity, interconnectedness, cross-jurisdictional activity, and substitutability."[19]

The public interest should play a more significant role, given that mergers have led to the litany of consumer problems listed above. Internet banking may provide services to customers far from physical branches, but a significant share of a consumer population has limited or no access to the internet.[20]

The Community Reinvestment Act (CRA) provides an ongoing report card on a bank's success in meeting a mandate to serve a community, yet regulators have approved many mergers at firms with less

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[14] Daniel Tarullo, *Regulators Should Rethink the Way They Assess Bank Mergers,* BROOKINGS INSTITUTION (March 16, 2022) https://www.brookings.edu/opinions/regulators-should-rethink-the-way-they-assess-bank-mergers/

[15] Statistica, Share of Population using Digital Banking, Statistica (website visited May 17, 2022) https://www.statista.com/statistics/946109/digital-banking-users-usa/

[16] This is Section 18(c) of the Federal Deposit Insurance Act, codified at 12 USC 1828.

[17] The FDIC is not the only agency that considers bank mergers. Most mergers must be approved under both the Bank Merger Act, under the purview of the FDIC, and the Bank Holding Company Act, under the purview of the Federal Reserve. Further, the Antitrust Division of the Department of Justice can sue to prevent the merger even if the banking agencies have approved it.

[18] Michael Hsu, Bank Mergers and Industry Resiliency, Brookings Institution, (May 9, 2022) https://occ.gov/news-issuances/speeches/2022/pub-speech-2022-49.pdf?source=email

[19] Jeremy Kress, *Modernizing Bank Merger Review,* YALE JOURNAL OF REGULATION (2020) https://openyls.law.yale.edu/bitstream/handle/20.500.13051/8305/Kress_Article._Publication__1_.pdf?sequence=2&isAllowed=y

[20] Daniel Tarullo, *Regulators Should Rethink The Way They Assess Bank Mergers,* BROOKINGS INSTITUTION (March 16, 2022) https://www.brookings.edu/opinions/regulators-should-rethink-the-way-they-assess-bank-mergers/

than stellar CRA ratings.[21] In many cases, this may simply be due to inattention. Scholar Mitria Wilson found agency indifference toward the "convenience and needs" standard in a review of post-financial crisis bank merger decisions. Wilson concluded that "[i]n the vast majority of the financial regulatory institutions' orders on bank merger or acquisition applications [since the 2008 crisis], there is no discussion of the regulators' analysis of the public-interest provision beyond a single reference to the fact that the regulator considered the issue."[22]

While personnel is policy and unwilling regulators may attempt to circumvent the obligations of statutes, some required steps can help. Regulators should begin with the presumption that a merger will *not* enhance public benefits, rather that assume it will. Executives seek mergers to enhance profits, and that may be through reducing costs or raising prices to the detriment of the public good. The FDIC should not approve a merger where the agency itself cannot enumerate the public benefits (as opposed to restating the institutions' promises). Further, each merger above a certain size, such as $100 billion, should include a series of public hearings. This, too, will require regulators to pay more attention to the convenience and needs of a proposal.

As for managerial considerations, the FDIC can improve its considerations in light of the massive frauds perpetrated by senior management of most of the nation's largest banks. We appreciate that the FDIC considers money laundering when it weighs mergers. Firms where there are "significantly adverse findings in this area may form the basis for denial of the application."[23] We urge a firmer standard such as a bar on mergers where a bank has been found guilty of misconduct in the previous five years.

Finally, the FDIC should return to the problem that, as a result of lax merger policies, a number of banks remain too big to fail. That is, should large banks begin to report losses, and the level of the liabilities exceed those of their assets, it remains questionable whether they could be liquidated without sending tremors through the financial system and broader economy. Leading scholars in the field of economics and law affirm the need to break up the mega-banks.[24] Studies affirm that the market considers mega-banks enjoy a bailout safety net, as measured by advantageous credit rates available to the mega-banks that are not available to smaller financial institutions or non-financial institutions.[25] The FDIC may be unable to force divestiture under its existing statutes, but no honest review of merger policy can ignore the too-big-to-fail issue. Leading members of Congress have introduced legislation to break up the mega-

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[21] National Community Reinvestment Coalition, Letter, FDIC (Jan 20, 2022) https://www.fdic.gov/resources/regulations/federal-register-publications/2022/2022-rfi-rules-regulations-statements-of-policy-regarding-bank-merger-transactions-3064-za31-c-001.pdf

[22] Mitria Wilson, *Protecting the Public's Interests: A Consumer-Focused Reassessment of the Standard for Bank Mergers and Acquisitions,* 130 BANKING L.J. 351, 372 n.8 (2013)., https://heinonline.org/HOL/LandingPage?handle=hein.journals/blj130&div=45&id=&page=

[23] The FDIC states: "In every case, the FDIC will take into consideration the effectiveness of each insured depository institution involved in the proposed merger transaction in combating money-laundering activities, including in overseas branches. In this regard, the FDIC will consider the adequacy of each institution's programs, policies, and procedures relating to anti-money laundering activities; the relevant supervisory history of each participating institution, including their compliance with anti-money laundering laws and regulations; and the effectiveness of any corrective program outstanding. . .. . Significantly adverse findings in this area may form the basis for denial of the application." From Statement of Policy on Bank Merger Transactions, FDIC (website visited May 18, 2022) https://www.fdic.gov/regulations/laws/rules/5000-1200.html

[24] See letter signed by economists, lawyers, OFFICE OF SEN. SANDERS, (Oct. 3, 2018) https://www.sanders.senate.gov/wp-content/uploads/Too-Big-to-Fail-letter-from-experts.pdf

[25] Nicole Allenspach et al, *Are Banks Still Too Big to Fail?* Swiss National Bank (2021) https://www.snb.ch/n/mmr/reference/working_paper_2021_18/source/working_paper_2021_18.n.pdf

banks; the FDIC should publicly endorse these proposals. The FDIC should also advance this recommendation for the Financial Stability Oversight Council. [26]

Again, we appreciate the FDIC's attention to merger policy, and applaud the Biden administration for its executive order to reassess mergers generally.

For questions, please contact Bartlett Naylor at bnaylor@citizen.org

Sincerely,

Public Citizen

[26] *Sanders, Sherman Introduce Legislation to Break Up Too Big to Fail Financial Institutions,* OFFICE OF SEN. SANDERS (Oct. 3, 2018) https://www.sanders.senate.gov/press-releases/sanders-sherman-introduce-legislation-to-break-up-too-big-to-fail-financial-institutions/