May 31, 2022

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

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

Submitted by email: Comments@fdic.gov

To Whom It May Concern:

The Committee for Better Banks writes in response to the Federal Deposit Insurance Corporation's (FDIC) request for comments 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 non-insured institution.

The Committee for Better Banks, the only independent voice for frontline bank employees, is a coalition of financial sector workers and labor organizations, including the Communications Workers of America, uniting to improve working conditions and to raise standards in the financial services industry. Through its bank accountability project, the Committee for Better Banks analyzes how working conditions impact the public interest, consumer protection, and the safety and soundness of financial institutions.[1]

We support expanding scrutiny of bank mergers to include analysis of a broader set of public interest impacts including bank workers' rights, racial and gender employment bias, and the impact of future branch opening and closings on access to jobs and capital. The FDIC and other bank regulators should seek to enjoin mergers that would cause harm to workers and other stakeholders and, where structural remedies are pursued, incorporate specific remedies to address the risks associated with an absence of workers' rights protections. To support this expanded review, we recommend that bank agencies collect information related to employment to better analyze the competitive effects of bank mergers and direct, indirect, and induced economic consequences of consolidation.

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?*

[1] For more information on the Committee for Better Banks, visit: www.betterbanks.org and www.bankaccountability.org

The current regulatory framework fails to adequately consider the impact a proposed bank merger will be in the public interest. The public interest is largely limited to considering the financial institution's Community Reinvestment Act rating. Missing entirely from the existing regulatory framework is consideration of whether the working conditions of employees are in the public interest.

While the terms and conditions of non-managerial workers at financial institutions directly impact consumers, this connection unfortunately has been too often overlooked.[2] Moreover, there is considerable evidence that bank consolidation threatens consumer well being by impairing the rights of workers in the financial services industry.[3] Further, bank consolidation generally results in job loss through branch and call center closings, especially in underserved communities, and customer servicing departments acquiring increased caseloads, performance metrics and sales goals.

The "fraudulent accounts" and many other customer abuse scandals at Wells Fargo, which cost the bank and its stakeholders billions of dollars, provide vivid examples of this nexus.[4] Wells Fargo's previous acquisitions and rapid growth have been identified as a contributing factor to the scandals.[5] The Norwest merger introduced cross-selling to Wells Fargo, and the Wachovia acquisition pushed the practice to an all-time high.[6] Not only did Wells Fargo executives establish a business model that relied on pressuring frontline workers to achieve unattainable sales goals or risk public humiliation in front of their coworkers and getting fired, but when the scandal came to light, executives initially tried to scapegoat and blame workers as the primary source of the abuses, stating the bank had fired over 5,300 workers.[7] It took regulators several years of investigations before executives were finally held to account.[8] Members of the Committee for Better Banks continue to consistently compare their conditions to toxic sales practices and culture at Wells Fargo, which is notorious among bank workers across the finance industry.

Wells Fargo is not an isolated case. A subsequent industry-wide probe by the OCC into sales practices found similar abuses at a number of banks, including at TD Bank which is currently seeking approval to purchase First Horizon Bank.[9]

Incorporating the views from bank workers into how regulations are implemented, including how bank mergers are reviewed, is already done in other countries. An example of best practices is the Nordic Financial Unions[10] participation to ensure European Union regulations take bank workers' perspectives into account.

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[2] Stephen Lerner, Rita Berlofa, Molly Mcgrath, And Corey Klemmer, Friedrich Ebert Stiftung, Tipping the Balance: Collective Action by Finance Workers Creates 'Regulating from Below,' September, 2018.

[3] House Committee on Financial Services, Testimony of Desiree Jackson, The Future of Banking: How Consolidation, Nonbank Competition, and Technology are Reshaping the Banking System, 117th Cong., September 29, 2021.

[4] Emily Flitter, "The Price of Wells Fargo's Fake Account Scandal grows by $3 billion", The New York Times, February 21, 2020, *available at: https://www.nytimes.com/2020/02/21/business/wells-fargo-settlement.html*

[5] House Financial Services Committee Majority Staff Report, The Real Wells Fargo: Board and Management Failures, Consumer Abuses, and Ineffective Regulatory Oversight, (Mar. 2020)

[6] Public Citizen, The 'King of Cross-Sell' and the Race To Eight: An analysis of Wells Fargo's cross-sell numbers since 1998, September 29, 2016.

[7] Matt Eagan, "5,300 Wells Fargo employees fired over 2 million phony accounts", CNN Business, September 9, 2016, *available at: https://money.cnn.com/2016/09/08/investing/wells-fargo-created-phony-accounts-bank-fees/index.html*

[8] Office of the Comptroller of the Currency, Issues Notice of Charges Against Five Former Senior Wells Fargo Bank Executives, Announces Settlement With Others, January 23, 2020.

[9] Patrick Rucker, "TD Bank/First Horizon: Faulty Accounts didn't draw fines from Trump Officials; workers say suspect practices persist as deal approvals sought," Capitol Forum, May 4, 2022.

[10] Nordic Financial Unions, see https://nordicfinancialunions.org/what-we-do/

Question 3*. To what extent should prudential factors (for example, capital levels, management quality, earnings, etc.) be considered in acting on a merger application?*

CBB supports extending all of the prudential factors to be considered in acting on a merger application, but our comments will focus on Management Quality and why it should include an examination of the working conditions of employees. While the FDIC's Risk Management Manual of Examination Policies states that the "quality of management is often the single most important element in the successful operation of an insured institution,"[11] assessing the quality of management and evaluating the associated risks associated with management practices and policies, especially regarding the bank's labor practices, is a missing consideration in evaluating a merger application. Yet, as the FDIC's guidelines further state, "[management] is usually the factor most indicative of how well risk is identified and controlled. For this reason, examiners should thoroughly review and explain the factors considered when assigning the management rating."[12] As a result, the section providing guidelines on evaluating management states that "given the fundamental reasons for conducting examinations, regulatory personnel must have access to all records and employees of a bank during an examination."[13]

While it has been made abundantly clear, there is an intimate connection between management quality and labor practices, there appears to be no guidance on how to implement or operationalize gaining access to all bank employees, particularly at one of the largest financial institutions such as Wells Fargo which employs approximately 250,000 people. There are no formal mechanisms to facilitate examiners gaining access to non-management employees at these large financial institutions. Currently, examiners must rely on bank executives to identify employees who could provide a frontline perspective on management quality. This is highly problematic and presents a clear conflict of interest for bank executives to "hand-pick" employees who will affirm the perspective of executives, instead of providing an assessment not influenced by management.

In order to facilitate a holistic analysis of Management Quality that includes an unvarnished perspective from non-management employees, CBB recommends eliminating barriers to worker participation in bank supervision.

First, the FDIC and other bank regulators reviewing a proposed bank merger should establish a "just cause" employment standard. Effectively integrating bank worker perspectives in industry oversight requires adequate protections to reduce barriers and ensure full participation in the oversight process. Creating a "just cause" protection would mean they could only be fired or disciplined for a legitimate reason, empowering workers to provide unvarnished information to bank examiners and regulators. The current at-will employment standard for bank workers is inadequate in protecting workers from retaliation for raising concerns related to risk management or regulatory compliance.

In order to enforce this "just cause" standard, regulators would establish an independent dispute resolution process. Banks with collective bargaining agreements would be able to opt-out of these requirements since they would already have a "just cause" standard and independent dispute resolution process. Again, the Nordic Financial Unions are a model to examine.

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[11] See, FDIC Manual, Section 1.1, Basic Examination Concepts and Guidelines, https://www.fdic.gov/regulations/safety/manual/section1-1.pdf

[12] Ibid.

[13] See, FDIC Manual, Section 4.1, Management, https://www.fdic.gov/regulations/safety/manual/section4-1.pdf

Second, the FDIC and other bank regulators should implement mechanisms that integrate direct, independent consultation with and feedback from frontline bank workers. Bank workers can provide examiners with critical information regarding the efficacy of the customer complaint resolution process, including how quality assurance and risk review teams interact to produce better or worse outcomes. Internal investigations of bank employees may mask management risk from inconsistent implementation of policies. Bank workers are eager for a role in industry oversight, but they need new mechanisms for participation that can empower them to more easily organize into unions. These recommendations elevate worker perspectives in regulatory and supervisory processes:

- **Worker Advisory Committees within Supervised Banks.** In order to provide regulators and examiners of supervised banks with access to frontline workers to gain their unique perspective, insight and advice, the FDIC and bank regulators should create advisory boards consisting of frontline workers selected independently from management. In order to establish these committees, the FDIC should enlist bonafide labor organizations to assist the agency in identifying, surveying, and setting up processes for selecting workers from a cross section of departments, functions and geographies within supervised banks. Once established, these advisory boards would confidentially provide bank examiners and regulators with information on how internal controls and protocols are actually implemented, could verify information they receive from management, and help identify potential risks or problems related to governance or other areas of concern before they metastasize. Finally, each of these bank-specific advisory boards would be able to assist the array of regulators including the OCC, FDIC, FRB, and CFPB with information.

- **Establish a Frontline Bank Worker Advisory Policy Council.** This Worker Advisory Policy Council would complement the array of industry stakeholder advisory councils that currently exist that advise regulators and policy makers on the finance industry by elevating their perspective on par with other stakeholders. Establishing a public advisory council consisting of non-management or frontline employees charged with identifying and assessing how existing and emerging employment practices and working conditions impact products, practices and services for consumers and other market participants would fill a significant gap that currently exists for policy makers. Given the range of competitive market pressures in the banking industry, the Board should consist of representatives of large, medium, and small banks, including CDFIs and MDIs. The Board should also recognize the need to be able to gain input from a wide range of workers from across bank operations, including departments responsible for different consumer products (e.g., mortgages, automobile loans, student loans, and credit cards).

Question 4. *To what extent should the convenience and needs factor be considered in acting on a merger application?*

The convenience and needs factor should be considered in acting on a merger application, particularly regarding the intersection of racial bias in employment and branch location that harms consumers. Bank consolidation contributes to persistent racial bias in employment practices.[14] The lack of diversity in hiring, training and advancement opportunities for minority employees at all levels has negative impacts on customers, especially in underserved communities.[15] Specifically, minority customers face

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[14] Committee for Better Banks, Advancing Racial Justice for Frontline Bank Workers, April, 2021

[15] Adisa Harget-Robinson, "The push to diversify from within the industry", ABC News, April 3, 2021, *available at: https://abcnews.go.com/Business/push-diversify-banking-industry/story?id=76568426*

discrimination, including being refused service to access their own banking accounts.[16] Insensitive comments made by Wells Fargo CEO Charles Scharf regarding the source of the problem being "a very limited pool of Black talent to recruit from"[17] reveals just how deep racial bias runs within large financial institutions.

Exacerbating this problem is the racial bias in determining the geographic location for closing and opening branches. The location of bank branches is a key factor in the accessibility of entry level jobs in the financial industry. Unfortunately, bank consolidation generally results in branch closures, which disproportionately harms low-income and minority communities in a myriad of ways, going beyond individual access to financial services.[18] For example, the reduction in economic opportunity due to bank branch closures can lead to increased income inequality through higher unemployment rates and lower median income.[19] Further exacerbating this trend, there is new evidence that consolidation also impacts banks' decisions about where to locate new branches.[20]

Not only do the lack of bank branches in low-income areas and communities of color make jobs less accessible, the lack of branches leads to higher cost and lower-quality financial services.[21] Branch closures are associated with a 3-year decline in small business economic activity, which leads to the inference that access to a branch positively promotes economic activity. Economic research on branch access finds that branches are key to credit rationing because they enable banks to collect soft information for loan decisions. This can mean the difference between whether a small business loan is approved or denied and if the terms of the loan are tenable for a minority entrepreneur. According to researchers affiliated with the Federal Reserve Board of Chicago, "The presence of a bank has significance that goes beyond sheer convenience to residents. The proximity of a bank to a neighborhood plays a role in the ability of the financial institution to collect soft information useful for lending, which can contribute to more favorable terms of credit. Closer distance facilitates more frequent interactions and relationship banking, which help mitigate the problems of information asymmetry and credit rationing."[22] The researchers reasoned that banks with branches in these areas can use relationship banking to develop insights into borrower quality through deposits and repeated interactions in branches. This information is layered with credit-scores to create a more complete picture of the borrower than relying just on credit scores or relationships alone.

Researchers with the Federal Reserve Board of Cleveland found that "mortgage originations increase, and interest rate spreads decline when there is a bank branch located in a low-to-moderate income neighborhood." The reason is the same as for other types of lending: credit scores have less utility in low-income areas because they represent incomplete and potentially biased information. Providing credit in areas where credit scores do not provide meaningful information makes branches more important

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[16] Emily Flitter, "This is what racism sounds like in the banking industry", The New York Times, December 11, 2019, Updated July 13, 2021, *available at: https://www.nytimes.com/2019/12/11/business/jpmorgan-banking-racism.html*

[17] Chris Isidore and Matt Eagan, "Wells Fargo CEO apologies for saying the Black talent pool is limited", CNN Business (September 23, 2020), *available at: https://www.cnn.com/2020/09/23/business/wells-fargo-ceo-bias/index.html*

[18] Zach FoxZain TariqLiz ThomasCiaralou Palicpic, "Bank branch closures take greatest toll on majority-black areas," S&P Global Market Intelligence, July 25, 2019 and Jacob Faber and Terri Friedline, "The Racialized Costs of Banking," New America, June 2018.

[19] Mark Garmaise and Tobias Moskowitz, "Bank Mergers and Crime: The Real and Social Effects of Credit Market Competition," University of California Los Angeles, 2006.

[20] Committee for Better Banks, "Truist Merger: New Branch Investment Cut Out Low-Income, Diverse Areas," September, 2021.

[21] Jacob Faber and Terri Friedline, "The Racialized Costs of Banking," New America, June 2018.

[22] Maude Toussaint-Comeau, Yi David Wang, Robin Newberger, "Impact of Bank Closings on Credit Extension to Businesses in Low-Income and Minority Neighborhoods," Journal of Black Political Economy, 2020, Vol. 47 (1) 20-4.

because they provide the bank with relational information about individuals and communities relevant to their ability to repay loans. This includes analyzing rent and utility payments to supplement traditional credit information, and partnering with community groups to provide financial education and counseling and identify qualified borrowers.[23] As the National Community Reinvestment Coalition puts it: "Disrupting the relationship between local bank branches and small businesses threatens to constrain access to the capital and financial services required for a successful economy."[24] The Pittsburgh Post-Gazette Editorial Board sums up the risks to communities, "When banks leave a community, credit can tighten. Livability erodes."[25]

Opening new branches allows customers to connect with credit provided by banks and can drive down the cost of credit when multiple branches compete for customers in the same geographic area. With the traditional branch costing roughly $2-4 million to set up and $200,000-400,000 per year to operate,[26] when banks open new branches, especially in underserved communities, they have additional direct economic development benefits including increasing the local multiplier effect. Branching has also been shown to increase bank system stability by diversifying their assets and widening their depositor base. Studies of branch failures and consolidation during the Great Depression found that branching increased competition, which increased financial stability by forcing weaker banks out of the banking system. Conversely, branch network optimization that concentrates branches around select borrowers to take advantage of economic scope through cross-selling and reduced costs impedes branching in underserved areas which further restricts access to credit in these areas.[27]

Case of Truist Merger Impact On New Branch Locations: The 2019 merger of BB&T and SunTrust into Truist Bank gives us a unique insight into the impact of mergers on the public interest in access to financial services. To overcome immediate concerns about the disparate impact of the merger in low-income and communities of color, during July 2019 testimony before the House Financial Services Committee the Chief Executive Officers of SunTrust and BB&T promised to open 15 new branches in low-moderate income areas once the merger was complete. SunTrust Chairman and CEO William Rogers said, "We also pledge to open at least 15 new branches in low to moderate income neighborhoods." He added that "Our focus will not abandon communities. We've committed to keep branches in rural markets. We've committed to open branches in LMI markets because our—we'll only be as strong as our communities."[28]

An analysis of federal data shows that Truist opened 10 branches in low-moderate income census tracts between January 1, 2020 and December 31, 2021, six of which were in diverse census tracts.[29] During the same time it opened 15 in majority-white upper income areas and clearly favored placing new branches in

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[23] O. Emre Ergungor, "Bank Branch Presence and Access to Credit in Low-to-Moderate Income Neighborhoods," Federal Reserve Bank of Cleveland, January 24, 2007

[24] Bruce Mitchell, Jason Richardson, Zo Amani, "Relationships Matter: Small Business and Bank Branch Locations," National Community Reinvestment Coalition, accessed August 2, 2021

[25] Editorial Board, "Banking for all: Cities should press for branches in poor areas," The Pittsburgh Post-Gazette, March 25, 2019.

[26] Dan Freed, "U.S. banks want to cut branches, but customers keep coming," Reuters, August 22, 2016. *available at:* *https://www.reuters.com/article/us-usa-banks-branches/u-s-banks-want-to-cut-branches-but-customers-keep-coming-idUSKCN10X0D6*

[27] Mark Carlson, Kris Mitchener, "Branch Banking, Bank Competition, and Financial Stability," Finance and Economics Discussion Series, Divisions of Research & Statistics and Monetary Affairs, Federal Reserve Board, Washington, D.C., 2005-20

[28] "House Financial Services Committee Holds Hearing on SunTrust and BB&T Bank Merger," July 24, 2019, CQ Transcripts

[29] Data from FDIC Branch Find Suite using effective dates of January 1, 2020 and December 31, 2021.

middle-income white areas, which received 10 new Truist branches compared to only one new branch in middle-income diverse areas.[30]

Truist Bank Branch Openings (2020-2021)			
Income	**Low-Moderate Income**	**Middle-Income**	**Upper-Income**
Majority Minority	6	1	0
Majority White	4	10	15
Grand Total	**10**	**11**	**15**

In addition to failing to meet public promises related to the merger, the post-merger company has shifted its branch opening strategy to favor wealthier communities. Comparing pre-merger opening trends for both SunTrust and BB&T with post-merger branch opening data under Truist shows that the bank has shifted dramatically away from investing in opening new branches in low-income and minority communities while simultaneously increasing investment in wealthier white areas. Truist reduced branch openings in low-moderate income and minority neighborhoods by 35 percent after the merger of SunTrust and BB&T banks. Prior to the merger, FDIC data shows that SunTrust and BB&T opened new branches in roughly the same numbers in low-income and minority areas as upper-income white areas.[31]

***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?*

The track record of regulators approving every proposed bank merger since 2003 speaks for itself. In response, The Committee for Better Banks supports enhanced scrutiny of bank mergers related to their purported and likely public interest outcomes.

The FDIC should require more convincing evidence that a proposed merger will benefit the public and start merger analysis from the presumption that a proposed merger is not in the public interest.[32] Wells Fargo is a case in point. Following a series of mergers and acquisitions, the bank has been subject to at least ten Consent Orders, including a cap on its total assets, issued by the Office of the Comptroller, the Federal Reserve Board of Governors, the Federal Deposit Insurance Corporation, and the Consumer Financial Protection Bureau that have resulted in billions in fines. These actions have led to calls by some elected officials that "Wells Fargo is too big to manage.[33]" An examination of the Wells Fargo case illustrates how workers' ability to exercise their rights is an important component of the public interest.

While merger review has not historically examined the effect proposed mergers would have on labor markets, labor market concentration is at high levels across the economy, and the effects are severe and ubiquitous, leading to wage stagnation and depression.[34] In industries such as banking where corporate

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[30] Committee for Better Banks, "Truist Merger: New Branch Investment Cut Out Low-Income, Diverse Areas," September, 2021.
[31] Ibid.
[32] Jeremy C. Kress, "Modernizing Bank Merger Review," Yale Journal on Regulation, 2020.
[33] Statement by U.S. Representative Maxine Waters, Chair of the Financial Services Committee, March 12, 2019. *available at: https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=402448*
[34] See, for example, Ioana Elena Marinescu and Eric A.Posner, "Why Has Antitrust Law Failed Workers?" February 14, 2019, https://ssrn.com/abstract=3335174; Efraim Benmelech, Nittai Bergman and Hyunseob Kim, "Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?," Nat'l Bureau of Econ. Research, Working Paper No. 24307, 2018, https://www.nber.org/papers/w24307.pdf; José Azar, Ioana Marinescu,

systems are integrated both horizontally and vertically, there are complex issues of concentration and control that affect access, quality, and cost for consumers as well as wages and other employment conditions for workers, as described below.

Given the negative impacts of corporate consolidation and employers' abuse of market power on workers' ability to exercise their rights and address racial and gender bias, the FDIC should rigorously examine labor market impacts of proposed mergers and seek to enjoin transactions that will cause harm to workers. Regulators increasingly recognize that in cases where mergers may worsen labor monopsony and constrain the elasticity of labor supply, transactions cannot be justified by their potential benefits to purchasers downstream with lower prices. Merger guidelines should be revised to require the FDIC, Office of the Comptroller of the Currency, and the Federal Reserve Board to consider labor market impacts of proposed transactions.

The importance of collective bargaining for mitigating employer market power should be recognized and incorporated in the merger review process. Merger guidelines should be revised to require that existing collective bargaining agreements be preserved in the course of mergers and that mergers should be enjoined if they threaten to reduce competition in labor markets. Further, where merger efficiencies don't allow for a structural remedy and therefore a consent decree is imposed, the FDIC and other bank regulators should look to collective bargaining as a tool to counterbalance the effects of labor market concentration, by considering provisions that advance worker free association among the conditions that the agencies may place on mergers to allow them to proceed where a proposed merger would increase employer market power and likely result in substantial harm to workers.

There are several additional provisions that may be appropriate for consent decrees to offset anti-competitive labor market power, including:

- Prohibition on non-compete clauses and similar restrictive contracts for workers (to the extent these contracts are not prohibited across the board under federal law);
- Provisions addressing informational asymmetries regarding wages, for example to eliminate non-disclosure agreements that prohibit employees sharing information about wages;
- Protections for employees to pursue employment claims on a joint, class, or collective basis in whatever forum.

In addition to consent decree provisions, the agencies should establish consultation opportunities, as mentioned earlier in our comments, for worker representatives to ensure that remedies do not harm workers and to oversee consent decree enforcement. If structural remedies are considered, worker representatives should be consulted as part of a Divestiture Review Task Force to evaluate the impact on the parties' workforce. The agencies could also expand the use of "monitoring trustees" to include worker representatives, an approach that has been used in other consent decrees, such as those related to police department oversight.[35] These approaches should be reflected in new merger guidelines for the FDIC and other bank regulators.

In conclusion, the Committee for Better Banks believes that greater scrutiny of bank mergers by analyzing a broader set of public interest impacts, including workers' rights, racial and gender bias, and future branch opening and closings, will lead to better working conditions for bank workers, improve

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and Marshall Steinbaum, "Antitrust and Labor Market Power," Economics for Inclusive Prosperity Research Brief, May 2019, https://econfip.org/wp-content/uploads/2019/05/Antitrust-and-Labor-Market-Power.pdf.

[35] These approaches have been suggested by Professor Hiba Hafiz in her recent article, "Rethinking Breakups," 71 DUKE L. J. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3892326.

compliance with consumer protections, increase access to jobs and capital, and protect against consolidations that shrink the real economy of local communities.

Sincerely,

Nick Weiner, Director
Committee for Better Banks
staff@betterbanks.org