California Reinvestment Coalition

May 31, 2022

James P. Sheesley,
Assistant Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street NW,
Washington, DC 20429.
Via Email: Comments@fdic.gov

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

Dear Assistant Executive Secretary Sheesley,

We thank the FDIC for initiating this Request for Information (RFI) process to consider the existing regulatory framework with regard to bank mergers. Bank mergers have historically had a significant impact on California communities, and this dynamic has only accelerated over the last couple of years. We concur that a review of the regulatory framework is appropriate and much needed in light of these community impacts, changes in the industry, the public's decreasing faith in the banking system, and the President's Executive Order which seeks to ensure Americans have choices among financial institutions and to guard against excessive market power.[1]

The California Reinvestment Coalition builds an inclusive and fair economy that meets the needs of communities of color and low-income communities by ensuring that banks and other corporations invest and conduct business in our communities in a just and equitable manner. We envision a future in which people of color and low-income people live and participate fully and equally in financially healthy and stable communities without fear of displacement, and have the tools necessary to build household and community wealth.

Following are our responses to the questions posed by the FDIC's RFI:

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?

Answer 1: We believe that only cursory consideration is given to statutory factors. This assessment is qualified by the fact that agency considerations and deliberations are not very transparent to the public, which generally only has access to certain public portions of the application materials submitted by Applicants, any responses provided to public comments by Applicants at their option, and the agency final orders. The Federal Reserve, to its credit, does on occasion issue Additional Information (AI) Requests which are made available to public commenters, as are Applicant responses. The current process further frustrates transparency by permitting

[1] See https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/

Applicants to seek confidential treatment for much information submitted as part of the application, leaving public commenters with only a slow-moving and often unfruitful Freedom of Information Act (FOIA) process. In our experience, the FDIC has been the least transparent of agencies, providing approval orders that may clock in at two pages. This provides the public with little information about the agency's decision-making process and frustrates public trust.

We are particularly focused on, and concerned about, the failure of the agencies to fully consider the "convenience and needs" factor. We believe that bank mergers often do not meet the convenience and needs standard, and that mergers rarely provide a public benefit. The bulk of our comments will focus on "convenience and needs."

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?

Answer 2: Climate considerations are a clear and large gap in the existing regulatory framework and assessment of financial stability risk. "Systemic risks have the potential to destabilize capital markets and lead to serious negative consequences for financial institutions and the broader economy. Under this definition, climate change, like the current COVID-19 crisis, is indisputably a systemic risk."[2] The U.S. Commodity Futures Trading Commission (CFTC) issued a report in 2020 on the impact of climate, which was adopted by a subcommittee of the Commission's Market Risk Advisory Committee, declaring climate change to be a major financial risk to the U.S. economy and recommending a package of actions financial regulators should take to address this risk, including putting a price on carbon.[3] We believe that climate and bank activities that contribute to or mitigate climate harm, are important considerations for both systemic risk and convenience and needs analysis.

We believe the prior $50 Billion threshold for Systemically Important Financial Institutions (SIFIs) was appropriate for triggering greater oversight and scrutiny. Setting a lower threshold for SIFIs or systemic risk would not necessarily result in a prohibition on such mergers. Instead, the threshold could merely ensure that such mergers were subject to additional scrutiny, which we believe is warranted. The public is not concerned that mergers are subject to too much scrutiny.

The rapid pace of consolidation, and the resulting creation of a few megabanks threatens to exacerbate regulatory arbitrage concerns. Institutions may believe that by virtue of their size they can command greater responsiveness from their prudential regulator, or else they could merely choose to switch charters. Regulators

[2] From https://corpgov.law.harvard.edu/2020/06/28/addressing-climate-as-a-systemic-risk-a-call-to-action-for-financial-regulators/
[3] https://www.theregreview.org/2020/11/04/ramani-climate-change-systemic-financial-risk/

may become vulnerable to such manipulations and lower scrutiny and standards in order to preserve or expand their portfolio of financial institutions. Such was the downfall of the Office of Thrift Supervision, which sought to attract charter applications by lowering standards, resulting in failed thrifts, and the shuttering of the agency by Congress. More recently, the OCC has taken to noting, with apparent pride, the percentage of bank assets under its regulatory control. We must prevent a situation where the agencies are competing with each other to be the first choice of banks seeking a new, and more lenient, regulator.

We are also seeing perverse arguments from multi-billion-dollar banks that their mergers are justified in the name of competition, as only multi-billion-dollar banks can compete with multi-trillion-dollar banks. Where does this argument end? The regulators must stop this race towards bigger and bigger banks that may serve corporate interests, but harms consumers, small businesses, and communities. Wells Fargo, with its numerous violations and stumbles, shows that bigger is not necessarily better.

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?

Answer 4: The convenience and needs factor should be bolstered and prioritized by the agencies in acting on a merger application. Reliance on existing Performance Evaluations (PE) is woefully inadequate. Performance Evaluations are not only backwards looking, but they are also often dated. Banks are examined only every few years, and there is often a significant lag between the evaluation and the public release of the PE. And importantly, PE ratings have been notoriously forgiving, with community groups decrying CRA grade inflation and the regulators themselves seeming to acknowledge this dynamic in their latest proposal to reform the CRA rules.

The convenience and needs of all stakeholders are not appropriately addressed under the current framework. Applicants merely assert that they will offer all of the same products and that the larger pro forma bank will have more capacity to lend. By this measure, all proposed mergers should be approved, and in fact, nearly every application is approved. This is not a reasonable consideration of convenience and needs.

The issue of branch closures is particularly relevant here. With or without mergers, banks have been closing branches at a rapid and accelerating pace. According to the National Community Reinvestment Coalition, more than 4,000 physical bank branch locations have closed since March 2020, and in the 20 months after COVID-19 reached US shores, banks closed about 200 branches per month on average – double the rate of the 20 prior months.[4] But the threat of branch closures is even greater during mergers. Branch closures are particularly concerning for rural communities, which are 10x more likely to be in banking deserts, and where 90% of households are likely to rely on physical branches to meet financial service needs.[5] We know that branch closures mean lost jobs, less convenience for consumers, fewer small business and other loans, and higher borrowing costs. Some consumers will likely fall out of the financial mainstream and be relegated to the use of check cashers and payday lenders. How is this a public benefit?

We have seen mergers where branch closures were promised, and this fact did not seem to influence regulatory decisions that the convenience and needs standard was satisfied. We have seen mergers where Applicants indicated there would be branch closures but attempted to shield from public view information about precisely how many branches would be closed, and where. We have also seen mergers where Applicants did not disclose whether and where branches would be closing. Even in the rare instance where the public might witness regulatory interest in this question, when the Federal Reserve issues an Additional Information Request seeking such information for example, Applicants do not seem to feel compelled to directly respond. The regulators should require that all Applicants be transparent about branch closure plans or commit to not close any branches, and that this information be made public. The prospect of branch closures should figure prominently in agency deliberations as to convenience and needs.

Convenience and needs should also include considerations of all aspects of a bank's relationship to consumers and communities. Will consumers of the acquired bank be subject to more onerous overdraft and other fees from the new pro forma bank? Do the banks rely on ChexSystems in a manner that bars entry to or forces consumers out of the financial mainstream? Will the new bank shun internal policies to mitigate against the financing of displacement? Does the acquiring bank's mortgage lending performance more poorly serve LMI communities and protected classes and threaten to increase racial wealth gaps and disparities? Has one or more banks abandoned a major product line, such as mortgage or small business lending, despite unmistakable evidence of unmet community need? Will the new bank exacerbate climate change hazards in communities of color? Will the larger institution dismiss relational banking in rural communities? Will communities see less lending and investment overall when two bank CRA programs become one? An affirmative answer to any of these questions suggests to us that Applicants have failed the convenience and needs standard, yet these issues appear never to be considered under the current regulatory framework. These and other considerations should be made, and agencies should require that merging institutions provides greater consumer protections and service to the bank's customers and greater reinvestment to the bank's communities. In recent mergers, CRC has urged merging institutions to increase reinvestment activity by 50% over current efforts of the acquiring and acquired institutions.

The CFPB should be consulted by the FDIC when considering the convenience and needs factor and this consultation process should be formalized. The CFPB is best placed to determine whether either banking institution has been guilty of receiving outsized and concerning consumer complaints, committing consumer

[4] https://ncrc.org/study-banks-doubled-the-pace-of-branch-closures-during-the-pandemic/#:~:text=More%20than%204%2C000%20physical%20bank,of%20the%2020%20prior%20months.

[5] https://files.consumerfinance.gov/f/documents/cfpb_data-spotlight_challenges-in-rural-banking_2022-04.pdf

protection violations, or subjecting consumers to onerous products, practices, and fees. CRC has argued during the merger process that when an acquiring bank employs more onerous overdraft policies than the acquired institution, that convenience and needs suffers. Recently, CRC and allies opposed a bank charter application filed by a nonbank entity. During the course of this challenge, it came to light that the Applicant was subject to an investigation by the CFPB. If community groups had not opposed the charter application, (which presumably triggered greater scrutiny of the application and extended the timeline by the agency), is it possible the agency might have streamlined the process and granted a bank charter to a company it deemed to be in a position to well serve the community at the very time that institution was being investigated by the CFPB for harming communities? We do not know. But this should never happen. The agencies should routinely and formally coordinate with CFPB (and HUD and DOJ regarding fair housing, fair lending, and other concerns) during the bank merger process.

Forward-looking convenience and needs and public benefit demonstrations can best be met by strong Community Benefits Agreements (CBAs) negotiated by financial institutions and community group stakeholders. The regulators have tended to dismiss such commitments from banks, while providing no alternative mechanism to require banks to better serve communities. The result has been, often, that communities and consumers lose through merger. This flies in the face of the convenience and needs prong. The regulators should require CBAs as part of the merger process. CBAs present the opportunity for a rare win-win-win situation – the community is assured of increased access and investment, the financial institution has reconfirmed its commitment to the community and developed potential partnerships and good will, and the regulator has met its duty to ensure that applicable standards are met. CBAs allow banks to identify, and work to meet, acute community needs in a way that the regulators seem unable and unwilling to prescribe. CRC has collaborated with our members, allies, and financial institutions to negotiate over $100 Billion in CBA commitments for California communities over the last few years.[6]

But the current process does not sufficiently support CBA discussions. For one, the process is not reasonably accessible to the public. Regulatory websites are opaque, and newspaper notice requirements are outdated, serving merely as an inexpensive way for institutions to meet legal obligations without actually informing the public. The thirty-day window to provide public comments is not amendable to dialogue between community groups and banks, especially when days are lost trying to figure out when a merger application was filed, how to retrieve the application, and where to contact the relevant bank personnel and regulatory staff. Some agency offices that receive merger applications do not even list all email addresses for relevant staff. We lost time during a recent merger because our searches of a regulatory website for “Banc of California” (the name of the bank) yielded no results because, for some reason, the application was filed under “Banc of CA.” Regulatory and bank websites must be more clear and transparent regarding bank merger filing deadlines, public portions of application materials, and contacts at the agency and banks in question. And the public should be given 90 days to respond to an application. The pubic cannot reasonably be expected to respond in a timely fashion to merger applications without significant changes to the process.

[6] See https://calreinvest.org/publications/bank-agreements/

Applicants that fully expect they have met the low regulatory standards set and fully expect their merger to be approved may feel they have no need to talk to impacted communities or address any concerns raised. This is where the importance of public hearings comes in. Public hearings on bank merger applications are notable when granted because they have been so rare. Yet hearings are one of the only ways to complete the record as to whether community credit needs, convenience and needs, and public benefit standards have been met. Otherwise, regulators are left to rely only on the submissions of Applicants, and any comments the public was able to submit within 30 days of filing. Even where we have been able to timely file comments, we have not had sufficient time to thoroughly review the application, research publicly available data, and consult with all of our members organizations to fully inform our comments. Public hearings should be required whenever members of the public raise substantive concerns about a bank merger.

The recent public hearing during the U.S. Bank/Union Bank merger application was instructive in a few respects. One, it was clear that the hearings provided a much fuller record and provided information that would not otherwise have been presented, enabling the regulators to make a more informed decision. The hearing also suffered from access concerns which should inform, and we believe is informing, future hearings. Given understandable concerns about the COVID pandemic, the regulators decided to convene the hearing virtually. In so doing perhaps for the first time, they had to deal with a number of issues which resulted in a clunky process characterized by multiple requirements and steps for participants, technology failures, and communication challenges.[7] Nevertheless, the regulators worked hard to trouble shoot problems and this resulted in a hearing that appeared to run very smoothly where we believe that most members of the public who wished to testify were able to do so. We also appreciate that the OCC has recently reached out to consider whether lessons from that hearing can inform the BMO Harris/Bank of the West and other hearings, to ensure a process that is even more accessible to the public. In many respects, in-person public hearings are preferrable to virtual hearings and should be reinstated once safe to do so. When that day comes, virtual testimony capacity would be a welcome and important complement to in-person hearings in order to provide greater access for those who may face challenges to participating in-person. The OTS used to host formal meetings from its offices in multiple cities to allow the public to testify and participate in the process from various locations throughout the country.

One other issue that complicates the merger process is the growing practice of Applicants asking community partners to write letters or testify in support of a merger. This puts community groups that partner with those banks, or that wish to, in an exceedingly difficult position. We believe that some groups that testify in support of bank mergers do so not because they support the merger, but because they fear the bank will no longer wish to partner with them if they do not provide support as requested. Even community groups that have no such

[7] A sample of comments from participants frustrated at various stages of the pre-hearing process include:

1. "I waited for 15 minutes without any response…. I clicked the link and never got on…Not making much progress with this ID process. Please advise ASAP;"
2. "I have not been able to speak with anyone yet. I have been on hold over an hour to get ID accepted and approval. I am having trouble getting registered."
3. "I am sitting on front of a black screen with message. We' ve let the host know that you are here...nothing is hhappening."
4. "I logged in around 11:00 am to get identified, stayed on for a while waiting for the host who never showed up. Tried three times, unsuccessfully. So I am screwed. Someone else will need to enter my testimony."

fear and enjoy a strong working partnership with a bank Applicant do not necessarily support a bank merger, do not necessarily know the full record of the bank's activities, and likely do not oppose the idea that the bank should commit or be required to make greater commitments to the community. During the recent U.S. Bank/Union Bank public hearing, certain groups purportedly supporting the merger, after hearing testimony from those opposed, indicated that they supported the idea that the bank should agree to a strong CBA. Community group comments in support of a bank merger, made at the request of an Applicant, should not be taken as support for a merger, but at best, as support for the proposition that the Applicant has helped meet community credit needs in the past from the perspective of the commenter. Applicants should be required to disclose publicly which community organizations and members of the public they have asked to testify in support of the merger, and which have received grant or other financing. This is to say nothing of our experience with a prior merger where our FOIA request revealed after the fact that Applicant-solicited support for a merger had been fabricated. To this day, we are not aware of any action taken by the regulator to penalize any party for defrauding the public process, or any action to ensure such fabrication does not occur again.[8]

The FDIC should not 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. The agencies seem intent on easing burdens for smaller institutions. But the impact on rural and smaller communities of local banks can be outsized, for good and ill. The loss of a local bank can have huge repercussions for local consumers, small business, homebuyers, and economies. Conceptually, the obligations should be the same even if the outputs are lesser – be transparent, increase consumer protections and increase community reinvestment.

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?

Answer 7: Clearly, the expectation of all stakeholders is that any reasonable merger application will be approved. We doubt that any potential merger partners have ever decided to abandon merger plans for fear of being denied, at least in recent memory. There is an implicit presumption of approval. To address this unhealthy dynamic, the regulators need to scrutinize merger proposals more clearly and actually deny those applications that fail to clearly demonstrate that convenience and needs and public benefit standards have been met. Where such deficiencies can be addressed by mitigating factors, such as the development of a strong Community Benefits Agreement negotiated with local stakeholders, then the regulators must approve mergers only with conditions requiring future performance to address community needs and impacts. The regulators must also develop a meaningful and realistic set of consequences for institutions that fail to comply with such conditions.

The FDIC recently approved the merger application of Tri Counties Bank and Valley Republic Bank with conditions requiring the Bank to revise its CRA Plan to develop specific and measurable *internal* goals, and to

[8] See David Dayen, "THE FAKE PUBLIC COMMENTS SUPPORTING A BANK MERGER ARE COMING FROM INSIDE THE HOUSE," The Intercept, September 29, 2018, available at: https://theintercept.com/2018/09/29/joseph-otting-occ-onewest-bank-merger-cit/

develop a Fair Lending Plan.[9] This is positive, but it is not clear what changes will made to ensure convenience and needs will be met, and it is not clear that any of this work product will be made publicly available.

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?

Answer 8: Perhaps the more appropriate inquiry is regarding how many merger applications have been denied for failure to meet the burden proof. It would be helpful if the FDIC and the agencies can identify how many applications have been denied over time and to tie those figures to the precise regulatory factor or factors that were not sufficiently met in each instance. We believe the overall number of mergers denied is extremely low, and those denied for failure to meet convenience and needs is negligible. The burden appears to be merely the cost of hiring counsel to complete documents that use boilerplate language that they know will pass regulatory muster.

All merger applications should demonstrate that the merger will produce a public benefit. We think this should be a high burden that can only be met by demonstrating a measurable increase in commitments to consumer protection and community reinvestment. The regulators should require that all Applicants reach out to community stakeholders in impacted areas, negotiate a strong Community Benefits Agreement (CBA), and submit as part of the application process a CBA that demonstrate a clear increase in reinvestment and consumer protection over existing performance.

Community groups do not have the capacity to sufficiently enforce CBAs, and we should not be expected to do so. It is the government's responsibility to ensure that financial institutions are meeting their obligations to help meet community credit needs, to meet convenience and needs, to establish a merger will provide a public benefit, and to ensure that fair housing and fair lending laws are being followed. The agencies have the resources, the capacity, the authority, and the oversight, and they should have the responsibility to ensure that public benefit is not just promised but delivered. The regulators should condition merger approvals on the finalization of and ongoing compliance with a CBA. This would place the responsibility on the agencies to review bank compliance with CBAs during the ensuing CRA examinations and any future mergers. We believe there is a precedent for this in the OCC's approval order of the application by Valley National Bank to acquire 1st United Bank.[10] After the merger, regulators should reach out to community groups to solicit input on bank compliance with the CBAs. A version of this should be happening currently in the form of community contacts, but in our experience, the regulators do not reach out often, and do not reach out to organizations for input regarding the CRA performance of any particular bank. The regulators should ask community group stakeholders if particular banks are complying with particular CBAs. This would be a measure of community impact and public benefit.

[9] See Louis C.C. Cheng, Assistant Regional Director, Order and Basis for Corporation Approval, Re: Tri Counties Bank Chico, California, Application for Consent to Merge with Valley Republic Bank, Bakersfield, California, December 13, 2021.
[10] See OCC Approval Order of Application for the merger of 1st United Bank, Boca Raton, Florida with into Valley National Bank, Passaic, New Jersey OCC Control Nos.: 2014-NE-138547, 2014-NE-138574 thru 138580, October 3, 2014.

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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

Answer 10: We need similar requirements for small institutions which are so important to rural areas.

In conclusion, the regulators must strengthen the existing framework for mergers to ensure that the public will benefit and so that communities are not harmed. The burden to make mergers work for communities has only been borne by community groups. This must change. Merger applications must be denied if a merger poses financial stability risk due to climate harms or other factors, if it will pose anti-competitive concerns, and if it fails to establish convenience and needs and a clear public benefit as reflected in a Community Benefits Agreement that shows measurable increases in consumer protection and community reinvestment.

Thank you for your review of this important process, and for your solicitation of public input on these critical matters.

If you have any questions about this letter, or would like to discuss the matter further, please contact Kevin Stein at kstein@calreinvest.org or Paulina Gonzalez-Brito at pgonzalez-brito@calreinvest.org.

Thank you for your consideration of our views.

Sincerely,

Paulina Gonzalez-Brito
Executive Director

Kevin Stein
Chief of Legal and Strategy