Brad M. Bolton, *Chairman*
Derek B. Williams, *Chairman-Elect*
Lucas White, *Vice Chairman*
Tim R. Aiken, *Treasurer*
Sarah Getzlaff, *Secretary*
Robert M. Fisher, *Immediate Past Chairman*
Rebeca Romero Rainey, *President and CEO*

May 31, 2022

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

**RE: REQUEST FOR INFORMATION AND COMMENT ON RULES, REGULATIONS, GUIDANCE, AND STATEMENTS OF POLICY REGARDING BANK MERGER TRANSACTIONS [RIN 3064-ZA31]**

Dear Mr. Sheesley,

The Independent Community Bankers of America ("ICBA")[1] appreciates the opportunity to offer comments in response to the Federal Deposit Insurance Corporation's ("the FDIC" or "the agency") request for public comments on the rules, regulations, guidance, and statements of policy that apply to bank merger transactions.

The current bank merger framework is flawed, outdated, and produces contradictory outcomes depending on the size and locations of the merger applicants. Too often, the bank merger framework prevents or unnecessarily delays mergers among small community banks, especially those located in sparsely populated markets, while authorizing megamergers among large banks and reinforcing marketplace concentration among a few financial institutions that are "too big to fail."

Additionally, the current framework fails to account for the significant competition to community banks posed by credit unions, nonbanks, and the Farm Credit System. This competition is not speculative or theoretical and must be considered in the bank merger framework to promote a fair and even playing field among marketplace competitors and permit responsible mergers among community banks. In a recent speech discussing the need to revisit the bank merger framework, the Acting Comptroller of the Currency cited changes across the financial services industry landscape and noted "between 1995 and 2020, membership in credit unions doubled, and total assets held by credit unions grew by more than 550 percent. Non-banks dominate in certain areas, like mortgage originations, in which their market

[1] The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With nearly 50,000 locations nationwide, community banks constitute roughly 99 percent of all banks, employ nearly 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding nearly $5.9 trillion in assets, over $4.9 trillion in deposits, and more than $3.5 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org.



WASHINGTON, DC
1615 L Street NW
Suite 900
Washington, DC 20036

SAUK CENTRE, MN
518 Lincoln Road
P.O. Box 267
Sauk Centre, MN 56378

866-843-4222
www.icba.org

share is close to 70%. And as banking has gone digital, fintechs like PayPal, Block, Stripe, and Shopify have acquired millions of users and collectively have processed trillions of dollars of transactions annually."[2] In light of these trends, and as the primary regulator for thousands of community banks, the FDIC can and should ensure the bank merger framework it designs to evaluate competition is, in fact, representative of actual marketplace competition and does not unfairly discourage, delay or prohibit community banks from scaling up to compete.

## I. ICBA RECOMMENDATIONS

ICBA encourages the FDIC to coordinate with the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System ("the Federal Reserve"), and the Department of Justice ("DOJ") to revise its merger analysis on an interagency basis to: (1) provide an even and competitive playing field among all market participants, including banks of all sizes, credit unions, non-bank financial technology companies, and farm credit associations; (2) prohibit the largest financial institutions from becoming monopolies that are "too-big-to-fail"; and (3) streamline and expedite the bank merger process for small bank merger transactions where moderate and responsible growth will ensure a continued community bank presence that best serves local communities, including rural and low-to-moderate income ("LMI") communities.

To accomplish these goals, ICBA encourages the FDIC to adopt the following recommendations to strengthen and improve the bank merger framework:

- Create a small bank *de minimis* exception whereby merger transactions among small banks are subject to faster agency review timeframes and are presumed to not create monopolies or anticompetitive effects.

- Apply a small bank *de minimis* exception to all proposed mergers where both the acquiring and acquired bank have $1 billion or less in assets, or in the alternative, have $750 million or less in assets and are therefore "small businesses" as defined by the Small Business Administration ("SBA") Small Business Size Standards.[3]

- For acquiring or acquired banks with $100 billion or more in assets, consult with the DOJ to determine whether the benefits of the merger outweigh the risk the combined institution will pose systemic risk or be "too big to fail."

- Include credit unions, a significant source of community bank competition, as "other institutions" in the Herfindahl-Hirschman Index ("HHI") calculations for Screen A and Screen B and ensure credit unions are assigned a 100% weighting as bank competitors.

---

[2] Michael J. Hsu, Acting Comptroller of the Currency, Remarks at Brookings, *Bank Mergers and Industry Resiliency* (Washington, DC, May 9, 2022) available at: https://www.occ.gov/news-issuances/speeches/2022/pub-speech-2022-49.pdf.

[3] U.S. Small Business Administration "Table of Small Business Size Standards Matched to North American Industry Classification System Codes" (May 2, 2022), available at: https://www.sba.gov/document/support-table-size-standards.

- Scrutinize credit union acquisitions of community banks and more closely evaluate whether credit unions that acquire community banks will fully meet the convenience and needs of the community when the combined entity is no longer subject to the Community Reinvestment Act ("CRA").

- Ensure the data used to measure overall banking activity in a market includes fintech companies, large banks that lend nationwide without geographic limitations, and online lenders that compete with community banks despite lacking a physical presence in any single geographic region or locality.

- Ensure that concentration is measured by accounting for lending activity since fintech companies, large national banks, online banks, and farm credit associations compete with community banks but may not accept deposits or report deposits to the FDIC in the same manner as community banks.

- Provide identical treatment for Farm Credit System ("FCS") loans in rural markets and agricultural loans made by other commercial banks.

- Ensure that community bank merger applicants are not subject to a higher burden of proof to demonstrate the criteria of the Bank Merger Act have been satisfied or a formalized consultation process with the Consumer Financial Protection Bureau ("CFPB") to evaluate the convenience and needs factor.

## II. The FDIC should create a small bank *de minimis* exception to the agency's bank merger framework.

The current merger framework is both too restrictive when applied to the smallest community banks and not restrictive enough when applied to the banks that pose systemic risk or are "too big to fail." One of these imbalances is easy to solve. The FDIC should amend its bank merger framework to ensure mergers among the smallest community banks can transact with speed and regulatory scrutiny that is proportionate to their small size, relative non-complexity, and lack of systemic risk.

ICBA urges the FDIC to create a small bank *de minimis* exception to its bank merger framework to expedite agency review of mergers among small banks and reduce associated transaction costs and burden. Under this exception, the FDIC should streamline its review of small bank mergers by subjecting these transactions to shorter agency review periods and adopting a presumption that these transactions do not create monopolies or anticompetitive effects. We suggest the FDIC apply this small bank *de minimis* exception to all proposed mergers where both the acquiring and acquired bank have $1 billion or less in assets, or in the alternative, have $750 million or less in assets and are therefore "small businesses" as defined by the Small Business Administration ("SBA") Small Business Size Standards.[4]

Removing some of the existing barriers for small bank mergers by creating a small bank *de minimis* exception will help small community banks explore moderate and responsible growth through merger

[4] *Id.*

activities and achieve economies of scale that will result in more efficient banks, a sounder banking system, and a healthier economy.[5]

In light of the important services community banks provide to rural and underserved markets, and because no individual community bank holds enough nationwide market share to pose systemic risk or be considered a monopoly, the FDIC's bank merger framework should relieve small banks from the same rigorous framework it applies to institutions that control billions and trillions of assets.

## III. Institutions with more than $100 billion in total consolidated assets should be subject to heightened scrutiny, but a presumption of systemic risk should not be determined based on asset size alone.

ICBA supports a bank merger framework that differentiates small bank mergers from mergers among large, complex financial institutions, and therefore we support extra regulatory scrutiny for mergers and acquisitions that involve institutions with more than $100 billion in total consolidated assets. However, the FDIC should exercise caution in establishing an asset size threshold which triggers a *presumption* that a merger transaction above that threshold poses systemic risk. Given the complexities involved in identifying and controlling systemic risk, and the multitude of factors that contribute to systemic risk, assigning a presumption of systemic risk above $100 billion is likely to capture some merger transactions that do not, in fact, pose systemic risk. As noted by the Congressional Research Service, "many economists believe the economic problem of too big to fail is really a problem of firms that are too complex or too interdependent to fail. Size correlates with complexity and interdependence, but not perfectly."[6]

Asset thresholds are infrequently updated by Congress, the FDIC and other bank regulators, and therefore rarely keep pace with the ever-changing financial services landscape. As such, a merger framework that predetermines systemic risk above a certain threshold may quickly become outdated and may not give appropriate weight to other emerging sources of systemic risk that are unrelated to asset size, particularly if the asset threshold for heightened scrutiny, as opposed to exemptive relief, is set too low. When asset thresholds that trigger heightened scrutiny are set too low, this can cause a "cliff effect" resulting in distorted market concentration among banks deliberately maintaining assets just below the threshold.

The FDIC need not look farther than to the initial post-financial crisis reforms designed to address systemic risk, and their subsequent amendments nearly a full decade later, to find an example of how the cliff effect can exacerbate concentration and consolidation among banks seeking to avoid crossing an asset threshold. Under the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act ("the Dodd-Frank Act"), designated nonbank systemically important financial institutions ("SIFIs") and all bank

---

[5] According to research conducted by the Federal Reserve, smaller banks benefit from economies of scale. *See* David C. Wheelock and Paul W. Wilson, "Do Large Banks Have Lower Costs? New Estimates of Returns to Scale for U.S. Banks," Working Paper 2009-054E, Federal Reserve Bank of St. Louis (May 2011). *See also* Gregory Elliehausen, "The Cost of Banking Regulation: A Review of the Evidence," Staff Study 171, Federal Reserve (Washington, D.C.: April 1998).

[6] U.S. Congressional Research Service, "Bank Systemic Risk Regulation: The $50 Billion Threshold in the Dodd-Frank Act," R45036, Marc Labonte and David W. Perkins (December 6, 2017), available at: https://crsreports.congress.gov/product/pdf/R/R45036/5.

holding companies ("BHCs") with more than $50 billion in assets were subject to "enhanced prudential regulation." In 2018, believing the $50 billion threshold inappropriately applied to too many banks that did *not* pose systemic risk, Congress increased this threshold to $250 billion and authorized the Federal Reserve to tailor enhanced prudential regulation requirements for BHCs with assets between $100 billion and $250 billion. According to S&P Global Market Intelligence data, in the aftermath of these threshold adjustments, the number of U.S. banks with more than $50 billion in assets increased from 39 banks at the end of 2017 to 52 banks by the first quarter of 2021.[7]

Rather than *predetermining* that any merger transaction above a certain asset threshold poses systemic risk, ICBA recommends the FDIC consult with the DOJ when a transaction results in an institution above $100 billion to determine whether the benefits of the merger outweigh the risk the combined institution will pose systemic risk or be "too big to fail." We believe this is a flexible, case-by-case approach that introduces an extra layer of scrutiny for large bank mergers without creating a "cliff effect" that discourages, delays or *de facto* blocks all large bank mergers above $100 billion, or that incentivizes institutions to hover in asset sizes just below $100 billion.

## IV. The FDIC should not establish bright line minimum standards for prudential factors, such as capital levels, management quality, and earnings in acting on a merger application.

ICBA supports merger and acquisition policies that promote competition, are reflective of responsible growth, and result in financially sound institutions that do not jeopardize the safety of the financial system. While we believe prudential factors such as capital levels, management quality, and earnings are important components of bank safety and soundness, we encourage the FDIC to maintain a flexible approach when considering prudential factors in a merger application. Like static asset thresholds, fixed bright line standards may not provide the FDIC sufficient agency discretion to make necessary case-by-case determinations on merger applications, particularly during or immediately after cycles of economic stress.

The FDIC should ensure its bank merger framework remains flexible so that community banks that need to combine with other local competitors due to generational ownership changes or to achieve necessary economies of scale, reduce costs through operational efficiencies, diversify business lines, or expand geographic reach are not forced to either merge with larger out-of-market institutions that are not as familiar with the community or be acquired by tax-exempt credit unions--outcomes that are not in the best interests of community bank customers that depend on, and would likely prefer, a continued local community bank branch and relationship presence.

## V. Because credit unions are subject to a less rigorous consumer protection regulatory framework, the FDIC should apply additional scrutiny under the "convenience and needs" factor to all acquisitions of banks by credit unions.

Under the Bank Merger Act, the FDIC is required to review, among other factors, a convenience and needs factor when evaluating merger applications. The convenience and needs factor requires the FDIC

[7] Nathaniel Melican and Fatima Aitizaz, *With the Sting Taken Out of Crossing $50B in Assets, Banks Pursue M&A*, S&P Global Market Intelligence (July 6, 2021) available at: https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/with-the-sting-taken-out-of-crossing-50b-in-assets-banks-pursue-m-a-65182869?utm_medium=website&utm_source=digitalnewsletter&utm_content=theinsightweeklydigital07.13.

to consider "the extent to which the proposed merger transaction is likely to benefit the general public through higher lending limits, new or expanded services, reduced prices, increased convenience in utilizing the services and facilities of the resulting institution, or other means. The FDIC, as required by the Community Reinvestment Act ("CRA"), will also note and consider each institution's Community Reinvestment Act performance evaluation record. An unsatisfactory record may form the basis for denial or conditional approval of an application."[8] We believe that credit union acquisitions of community banks demand robust scrutiny under the convenience and needs guidelines since credit unions are exempt from CRA, are subject to fewer fair lending exams, and may have field of membership restrictions that may prevent customers of an acquired bank from becoming members of the resulting credit union.

The current convenience and needs guidelines, which consider the CRA performance of both merging banks, are appropriate for the evaluation of traditional bank-to-bank mergers. However, when a credit union acquires a bank, the guidelines provide an incomplete analysis because credit unions are exempt from compliance with the federal CRA. Therefore, when a credit union acquires a community bank, it is not possible to evaluate the credit union's record of lending to low and moderate income (LMI) individuals nor to evaluate its lending to small businesses. This data would be available if credit unions were subject to CRA, but because of their exemption, regulators and the general public have less transparency into their lending practices. This is further problematic because after the credit union acquisition of a bank, often structured as a purchase and assumption transaction, is complete, the combined institution remains CRA exempt. Therefore, while the acquired bank would have previously had an ongoing obligation meet the credit needs of LMI borrowers in its assessment areas, once it is acquired by a credit union, regulators lose their ability to conduct CRA examinations to ensure the merged institution will continue to satisfy the mandates of the CRA.

When the FDIC is evaluating a credit union acquisition of a community bank, it should consider the fact that the resulting institution will not have the same regulatory requirement to meet the credit needs of LMI families under its needs and convenience analysis. Because credit unions are not subject to CRA, we have less insight into whether they truly meet the needs of LMI customers, and the credit union industry has not responded to calls for greater transparency. For example, a 2006 Government Accountability Office (GAO) report found the National Credit Union Administration (NCUA) does not have adequate data to determine the extent of credit union service to underserved populations and should develop such data.[9] Eighteen years later, the NCUA has yet to address this GAO recommendation. Furthermore, the GAO study also found that credit unions serve a lower proportion of low- and moderate-income households than banks.[10]

Currently, banks and other stakeholders can file a formal CRA protest if they believe that a proposed merger will reduce the level of community reinvestment caused by a proposed merger. In our experience, there is significant reluctance by bankers to file a formal protest, even if they think a deal is

---

[8] FDIC, Laws, Laws Regulations, and Related Acts, "Statements of Policy – Statement of Policy on Bank Merger Transactions," available at: https://www.fdic.gov/regulations/laws/rules/5000-1200.html.

[9] *See* Government Accountability Office, *Report to the Chairman, Committee on Ways and Means, House of Representatives*, "Greater Transparency Needed on Who Credit Unions Serve and on Senior Executive Compensation Arrangements" (Nov. 2006), available at: https://www.gao.gov/assets/gao-07-29.pdf.

[10] *Id.* at p. 97.

likely to have a negative effect. Bankers fear that filing a complaint may appear petty or selfishly motivated, or that the process will in turn be weaponized against them if they attempt a merger in the future. Therefore, we do not believe it is likely that the banking industry will file CRA protests in cases when a credit union acquires a community bank. In lieu of this process, we urge the FDIC to view credit union acquisitions as inherently suspect under the convenience and needs factor, since one of the parties is exempt from CRA. While we do not believe credit union acquisitions of banks should ever be permitted as a matter of public policy, at a minimum, the FDIC should require enhanced scrutiny of these types of transactions and apply a burden shifting framework wherein the bank and acquiring credit union are required to present a plan and funding commitments that demonstrate they will continue to meet the needs of LMI customers in the bank's assessment areas, even after the deal is completed and it becomes exempt from CRA.

In addition to our concerns with the credit union industry's exemption from CRA, the NCUA conducts far fewer fair lending exams than the FDIC, so the FDIC should place additional scrutiny on an acquiring credit union's fair lending record. According to the NCUA's 2021 Annual Report, the agency spent 5,136 hours examining 29 credit unions for compliance with fair lending laws and regulations.[11] Agency staff spent an additional 994 hours performing 39 offsite supervision contacts to review credit unions' loan policies and, if necessary, provide recommendations to bring them into compliance with fair lending laws. [12] This means that an overwhelming majority of the 4,942 federally insured credit unions were not examined for compliance with fair lending laws in 2021. By contrast, every bank is examined for fair lending on a regular basis on a 12-month or 18-month cycle, and every year the FDIC conducts approximately 1,000 fair lending examinations.[13]

An additional consideration for the FDIC when evaluating a credit union acquisition of a community bank is credit union field of membership restrictions. Against the strenuous protests of ICBA, the NCUA and credit union industry have significantly weakened the limitations on field of membership in recent years. However, the fact remains that credit unions are only permitted to serve customers who are eligible to become members according to the field of membership restrictions, which for federal credit unions are outlined in the NCUA's Chartering and Field of Membership Manual.[14] If a credit union purchases a community bank, the FDIC should conduct an analysis to ensure that the bank's customers are eligible for membership in the acquiring credit union. Thus, to the extent any portion of bank customers are ineligible for membership, the FDIC should weigh this factor against approving the acquisition because it will leave customers less well served and may force them to travel greater distances to access financial services.

---

[11] National Credit Union Administration, 2021 Annual Report, at p. 86, available at: https://www.ncua.gov/files /annual-reports/annual-report-2021.pdf.

[12] *Id*.

[13] In 2021, the FDIC conducted approximately 1,000 consumer compliance examinations; The FDIC conducts a fair lending review as part of every consumer compliance examination. *See* FDIC 2021 Consumer Compliance Supervisory Highlights, (Mar. 2022), at 2 and 9, respectively, available at https://www.fdic.gov/regulations /examinations/consumer-compliance-supervisory-highlights/documents/ccs-highlights-march2022.pdf.

[14] *See* 12 CFR Part 701

Finally, allowing credit unions to acquire community banks is harmful to the community because it erodes the tax base. Credit unions leverage their tax-exempt status to buy community banks in all cash offers, paying premiums in excess of 184% of tangible book value.[15] ICBA estimates credit union acquisitions of community banks amount to a loss of roughly $300 million annually in federal income taxes alone. The credit union tax exemption for the $2 trillion industry costs taxpayers $2 billion per year and is rising at the federal level.[16] Acquisitions of community banks by credit unions are often simply a form of tax arbitrage that do not promote market competition or consumer welfare.

## VI. To reflect their status as full-fledged competitors to banks, the FDIC should consider credit unions as "other institutions" when conducting the HHI screen.

The Herfindahl-Hirschman Index (HHI) is a quantitative screen used to analyze the market shares of merging enterprises, including banks, to determine if a proposed combination is likely to be anticompetitive. In general, if the post-merger HHI does not exceed 1800 or increase by more than 200, the federal banking agencies are unlikely to review further the competitive effects of the merger. One of the greatest challenges in using the HHI as a measure of competition is that the metric does not fully and appropriately account for all relevant competition in the market.

Credit unions are significant competitors for community banks and are functionally identical in the eyes of the consumer. As entities that compete with community banks for both loans and deposits, credit unions should be included in HHI analysis as "other institutions" during the bank merger screen process. Yet current merger guidelines only consider "evidence that a credit union has such membership restrictions, or lack of restrictions, and offers such services to commercial customers that it should be considered to be in the market" after Screen A or B of the guidelines highlight a proposed merger as requiring further review.[17] This calculation does not accurately reflect the current competitive realities that community banks face from credit unions, and it reinforces fictitious differences between credit unions and community banks that overstates the market share of community banks. Instead, it is appropriate to consider credit union competition in the same manner as competition from other commercial banks – specifically by including them as "other institutions" when calculating HHI for Screens A and B, to account for credit unions' lending volume within community bank markets.

In an ICBA survey of 186 community banks, bankers were asked to rate the level of competition they faced from large banks, other community banks, credit unions, and the Farm Credit System from 1 to 5 (with 5 being the most competitive). 44.8% of community bankers rated credit unions a 4 or a 5 in competitiveness and 75.9% rated credit unions a 3 or above. In terms of average competitiveness, community banks rate credit unions as more significant sources of competition than either large banks

---

[15] In its pending acquisition of Heritage Southeast Bank, Vystar Credit Union agreed to pay 184% of Heritage Southeast's tangible book value. *See* Paul Davis, *American Banker*, "VyStar lines up biggest-ever bank purchase by a credit union" (Apr. 1, 2021), available at: https://www.americanbanker.com/news/vystar-lines-up-biggest-ever-bank-deal-for-a-credit-union.

[16] Robert Fisher, "Credit union acquisition milestone demands Washington response," *Business Observer* (Sep. 15, 2021), available at: https://www.businessobserverfl.com/article/credit-union-acquisition-milestone-demands-washington-response.

[17] United States Department of Justice, Antitrust Division, "Bank Merger Competitive Review – Introduction and Overview" (1995), available at: Bank Merger Competitive Review -- Introduction And Overview (1995) (justice.gov).

or the Farm Credit System. Additionally, a report by the Conference of State Bank Supervisors found that "credit unions were named by between 14% and 20% of bankers as a dominant primary or secondary source of competition for [both transaction and non-transaction deposits]."[18]

Empirical research confirms bankers' concerns that credit unions are unfairly competing with community banks. For example, a Federal Reserve Bank of St. Louis study from 2000 concluded "commercial banks and credit unions are direct competitors in the local household deposit market."[19] This study, which analyzed data from 1,062 counties over a period of 7 years, found that in markets where banking became more concentrated, for example as a result of a bank merger, credit union participation increased during the subsequent year and that "an increase in the rate of participation at credit unions in a given year will cause more concentration in the commercial-banking market of the respective county during the next year."[20] These results quantitatively demonstrate that customers, and credit unions themselves, view banks and credit unions as close substitutes for deposit accounts.

Market data also confirms credit unions actively compete to attract bank depositors as customers for credit union loan products. For example, a 2001 study of the competitive role of credit unions in small markets concluded "new vehicle loan rates offered by banks in relatively small consumer lending markets are affected in a significant manner … by the share of credit unions in those markets."[21] In other words, where credit unions were present in a market, banks were required to adjust their auto lending rates to respond to increased competition. Based on anecdotal feedback from bankers, this competitive pressure extends to the markets for every loan product credit unions offer. This significant level of competition is evidence that it is appropriate to include credit unions in the market definition when assessing the competitive effect of bank mergers.

In the past, it may have made sense to exclude credit unions from the market definition when examining bank mergers – but no longer. Credit unions' tax-exempt status and the relaxation of field of membership restrictions has transformed the credit union industry from a niche player into a full-fledged rival to commercial banks. According to statistics from the Credit Union National Association, in 1995 credit unions nationwide had 68,522,495 members and held assets of $312.9 billion. As of 2021, credit unions have nearly doubled their membership to 128,580,679 members and have grown their asset size nearly sixfold to $1.9994 trillion, growth of 87.65% and 539% respectively.[22]

---

[18] Conference of State Bank Supervisors (CSBS), "Community Banking in the 21st Century 2021" (Sept. 28, 2021), available at: https://www.communitybanking.org/~/media/files/publication/cb21publication_2021.pdf.

[19] William R. Emmons and Frank A. Schmid, "Bank Competition and Concentration: Do Credit Unions Matter?," Federal Reserve Bank of St. Louis Review, (May/June 2000), p. 29-42, available at: https://research.stlouisfed.org /publications/review/2000/05/01/bank-competition-and-concentration-do-credit-unions-matter/. (emphasis added).

[20] Id. at 39.

[21] Feinberg, R. M. (2001), "The Competitive Role of Credit Unions in Small Local Financial Services Markets," The Review of Economics and Statistics, 83(3), 560–563, available at: http://www.jstor.org/stable/3211556. If anything, the degree to which community banks and credit unions compete has only increased since 2000.

[22] See Credit Union National Association, Credit Union and Economics Data, "Credit Union Trends by Asset Size," (accessed on 1/18/2022), available at: https://www.cuna.org/advocacy/credit-union---economic-data/data---statistics.html.

Under the current framework, federal banking regulators are permitted to consider a credit union to be in the market of two merging banks when it "has such membership restrictions, or lack of restrictions, and offers such services to commercial customers that it should be considered to be in the market." In our view, because all credit unions compete with community banks and are viewed as functionally identical by consumers, credit unions should always be considered as competitors in the market whenever the FDIC analyzes proposed bank mergers.

However, short of considering all credit unions as competitors to banks, the agency should, at the very least, consider credit unions designated as low-income credit unions to be competitors. Traditional credit unions have a cap on the number of commercial loans they are permitted to make to member-owned small businesses – known as the member business lending (MBL) cap.[23] Credit unions designated as low-income credit unions are exempt from the MBL cap[24] and are full-fledged competitors to community banks for small business loans – the most important product line from a business perspective for most community banks. These credit unions are competitors to banks in fact and should be considered as such for purposes of the bank merger analysis.

## VII. Market share is not an adequate indicator of the extent of competition in the market.

Despite online lenders' abilities to engage in banking activities in virtually every local market in the United States and directly compete with community banks for market share, the current merger framework does not accurately measure the competitive influence of online lenders' market share. The FDIC's current approach does not measure the availability of banking services generally, including loans and deposits in a market, and instead uses branch deposit data as a proxy for measuring competition.

Deposit data is an outdated and flawed proxy for bank competition because it does not appropriately measure the deposits of online banks that, by definition, do not have a physical presence and can gather deposits from and make credit available to consumers in any market without geographic restrictions. Because online banks do not operate physical branches in any of the local markets they serve, these institutions can select the location of their headquarters and/or main offices as "branches" for purposes of reporting their deposits to the FDIC. Therefore, even if an online bank services a multitude of local markets besides the local market(s) in which their "branches" are located, the online bank will only book deposits in select market(s). As such, deposit data understates deposits in the local markets the online bank actually serves and overstates the deposits in the local market(s) the bank chooses to report. Since deposit data does not accurately reflect the totality of the geographic markets where online banks operate and compete, the FDIC should instead measure concentration by evaluating lending activity as well as deposit taking.

In addition to competition from online lenders and credit unions (as previously discussed), community banks also experience significant competition from the Farm Credit System ("FCS") which is not reflected in deposit-based measures of competition. As such, ICBA encourages the FDIC to provide identical treatment for loans made by farm credit associations and agricultural loans made by commercial banks. Under the current framework, lending from farm credit associations is only a

---

[23] *See* 12 CFR 723.8

[24] 12 CFR 723.8(d).

"mitigating factor" in the competitive analysis even though farm credit associations are the primary competitor of community banks in rural markets.[25] According to a study conducted by the Federal Reserve Bank of Kansas City, which evaluated competition in local agricultural markets, farm credit associations "often reduce measures of local market concentration, which implies excluding them from market structure analyses may understate the market's competitiveness."[26]

According to U.S. Department of Agriculture statistics, the FCS provides 22.45 percent more credit to the agricultural sector than the banking sector ($195.5 billion versus $159.9 billion), making competition from FCS lending more significant than "a mitigating factor." In a survey of 186 community bankers, 54.1 percent reported losing loans to the FCS, suggesting consumers view FCS lenders as "close substitutes" to community banks.

The FCS has expanded its market share in recent years due to its tax and funding advantages as a government sponsored enterprise ("GSE"), and it is the only GSE that competes directly against tax paying community banks in commercial lending markets. FCS lenders pay no taxes on their commercial real estate lending, the main reason the FCS has rapidly gained market share over the commercial banking sector in recent years, an advantage particularly damaging to community banks. When the bank merger framework was last updated in 1995, FCS loan volume was only $41 billion, whereas today the FCS loan volume is $323 billion.[27] The high volume of lending that FCS conducts today should warrant the identical treatment between loans made by farm credit associations and agricultural loans made by commercial banks in any analysis of market share and competition.

## VIII. The FDIC should not impose a higher burden of proof on community bank merger applicants to demonstrate that the criteria of the Bank Merger Act have been satisfied.

Community bank merger applicants should not be subject to a higher burden of proof than currently exists. Exploring a merger transaction is an expensive, time consuming, and resource intensive endeavor. A community bank's decision to merge is the result of thoughtful and strategic consultation among its board, management, lawyers, consultants, consumer and community groups, and numerous regulatory agencies and involves multiple steps of agency and public review, including pre-filing discussions, a written application, a public comment period, and an approval process among the highest levels of regulatory agency staff and leadership.

The fact that few mergers are ultimately denied is not reflective of an insufficient burden of proof, an implicit presumption of approval, agency rubberstamping, or a defective process. Rather, the small

---

[25] "[I]n rural markets where agriculture is a primary business activity, the Farm Credit System's retail lenders, known as Farm Credit Associations … are particularly important nonbank competitors." Charles S. Morris et al., *Competition in Local Agricultural Lending Markets: The Effect of the Farm Credit System*, FED. RES. BANK OF KANSAS CITY ECON. REV. 51-52 (4th Quarter 2015).

[26] *Id.*

[27] *See* Farm Credit Administration, Quarterly Report Risk Analysis of Farm Credit System Operations, Second Quarter 1997 available at: https://www.fca.gov/template-fca/download/ReportArchives/FCAQuarterly ReportJune1997.pdf. *See also* 2020 Annual Report of the Farm Credit Administration Regulator of the Farm Credit System available at: https://www.fca.gov/template-fca/about/2020AnnualReport.pdf.

percentage of denials demonstrates the existing process appropriately identifies (ideally at an early stage of the pre-filing process) transactions that are unlikely to be approved and reflects ongoing pre-filing dialogue between the FDIC and banks to identify deficiencies in merger applications that must be corrected well in advance of the application's review or approval. Given the existing costs, time, and resources necessary to complete a merger transaction, with the exception of mergers involving systemically important financial institutions, the FDIC should not impose additional and unnecessary burden on merger applicants by ratcheting up the burden of proof in what is already a rigorous application process. Additionally, the FDIC should avoid imposing any higher burden of proof on community bank merger applicants at late stages of the application process, after extensive vetting, preparation and expenses have already been incurred.

## IX. The FDIC should not formalize a consultation process with the CFPB when considering the convenience and needs factor, especially if the transaction involves community banks that are not supervised by the CFPB.

The FDIC is a capable compliance regulator for community banks and is well equipped to evaluate whether merger applicants can satisfy the convenience and needs factor. Formalizing a consultation process with the Consumer Financial Protection Bureau (CFPB), a regulator that does not have direct supervisory authority over community banks, will unnecessarily delay and complicate small bank merger transactions. Further, the FDIC should avoid formalizing any consultation process with the CFPB, which exceeds the CFPB's statutory authority, is not contemplated by the Bank Merger Act, and which provides no measurable benefit to a review process the FDIC has historically and competently conducted on its own accord, and in conjunction with the DOJ, OCC, and Federal Reserve.

## X. CONCLUSION

ICBA encourages the FDIC to coordinate with the DOJ, OCC, and the Federal Reserve to modernize the bank merger framework, and to utilize interagency notice and comment rulemaking to inform the agencies' decision-making process. Community banks face steep competition from online lenders, large banks, credit unions, and the FCS, and should be permitted to scale up and compete without undue scrutiny and restrictions on merger activities caused by an outdated merger framework. Should you wish to discuss our positions in further detail, please feel free to contact Jenna Burke at jenna.burke@icba.org or Mickey Marshall at michael.marshall@icba.org.

Sincerely,

/s/ Jenna Burke
Senior Vice President, Senior Regulatory Counsel
Independent Community Bankers of America

/s/ Mickey Marshall
Director, Regulatory Legal Affairs
Independent Community Bankers of America