April 10, 2025

Jennifer Jones, Deputy Executive Secretary
Comments/Legal OES (RIN 3064-ZA45)
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: Statement of Policy on Bank Merger Transactions; FDIC RIN 3064-ZA45; Document Number: 2025-03832; 90 Fed. Reg. 11679 (Mar. 11, 2025)

Dear Ladies and Gentlemen:

Better Markets[1] appreciates the opportunity to comment on the proposed rescission of the 2024 Statement of Policy on Bank Merger Transactions ("Proposal") from the Federal Deposit Insurance Corporation ("FDIC" or "Agency").[2]

The Proposal would wrongly withdraw and discard the 2024 Statement of Policy ("2024 Policy"),[3] which was put in place after years of prudent, judicious, and appropriate analysis.[4] This deliberative process resulted in necessary changes that ***strengthened and improved*** the merger review process. The FDIC itself detailed the many benefits of the 2024 Policy relative to the prior policy—initially implemented in 1998 and had been amended most recently in 2008:[5]

1 Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

2 Statement of Policy on Bank Merger Transactions; RIN 3064-ZA45; Document Number: 2025-03832; 90 Fed. Reg. 11679 (Mar. 11, 2025), https://www.federalregister.gov/documents/2025/03/11/2025-03832/statement-of-policy-on-bank-merger-transactions.

3 Final Statement of Policy on Bank Merger Transactions; FDIC RIN 3064-ZA31; Document Number: 2024-22189; 89 Fed. Reg. 79125 (Sept. 27, 2024), https://www.federalregister.gov/documents/2024/09/27/2024-22189/final-statement-of-policy-on-bank-merger-transactions.

4 *See, e.g.*, Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions; FDIC RIN 3064-ZA31; Document Number: 2022-06720; 87 Fed. Reg. 18740 (Mar. 31, 2022), https://www.federalregister.gov/documents/2022/03/31/2022-06720/request-for-information-and-comment-on-rules-regulations-guidance-and-statements-of-policy-regarding; Request for Comment on Proposed Statement of Policy on Bank Merger Transactions; FDIC RIN 3064-ZA31; Document Number: 2024-08020; 89 Fed. Reg. 29222 (Apr. 19, 2024), https://www.federalregister.gov/documents/2024/04/19/2024-08020/request-for-comment-on-proposed-statement-of-policy-on-bank-merger-transactions.

5 Statement of Policy on Bank Merger Transactions, *supra* note 2, at 11679.

> ***The [2024 Policy] updates, strengthens, and clarifies the FDIC's policies related to the evaluation of bank merger applications.*** As compared to the Superseded Statement, the Final Statement includes new content; is more principles-based; addresses jurisdiction and scope; describes the FDIC's approach to each statutory factor separately; and highlights other matters and considerations such as interstate mergers and the unique aspects of applications from non-banks, operating non-insured entities, and banks that are not traditional community banks. The Final Statement highlights the FDIC's expectations relative to each statutory factor and incorporates analytical considerations for these areas.[6]

The 2024 Policy detailed the FDIC's expectations for mergers in the context of five statutory factors:

- Monopolistic or anticompetitive effects;
- Financial resources, managerial resources, and future prospects;
- Convenience and needs of the community to be served;
- Risk to the stability of the US banking or financial system; and
- Effectiveness in combatting money laundering activities.[7]

The 2024 Policy, while not perfect, is superior to the 2008 policy for several reasons, including:

1. The 2024 Policy states that the post-merger bank would need to ***better*** meet the convenience and needs of the community and be financially ***stronger*** than the original entity. This sets an appropriately high standard for the outcome of bank mergers for the public interest and financial stability.

2. The 2024 Policy contains a financial stability standard for merger transactions that resulted in a bank with more than $100 billion in total assets. This was not in the prior policy. In its Proposal, the FDIC says that this is not a concern because there is sufficient reference to financial stability in the FDIC's Applications Procedures Manual.[8] We do not think this is sufficient because a manual does not have the same weight or standing as an agency policy that has been implemented through the appropriate notice and comment process.

3. The 2024 Policy clarified the FDIC's expectation that public hearings be held for mergers resulting in a bank with $50 billion or more in total assets. Such hearings are in the public

6 Final Statement of Policy on Bank Merger Transactions, *supra* note 3, at 79125 (emphasis added).

7 *Id.* at 79126-28.

8 Statement of Policy on Bank Merger Transactions, *supra* note 2, at 11680.

> interest and provide a vital forum to receive public input before the most consequential mergers are approved.

The FDIC's goal with this Proposal is to address what it calls "considerable uncertainty" in the 2024 Policy.[9] Better Markets supports this goal and, in fact, advocated for additional clarity in the 2024 Policy.[10] Unfortunately, the FDIC chose not to add this clarity in the 2024 Policy,[11] but we still think adding clarity could be beneficial.

However, we strongly oppose the current Proposal because it would move backward to a policy with even less clarity. Instead, the FDIC should keep the 2024 Policy in place, which it clearly and affirmatively said was superior to its prior policy,[12] and move forward with appropriate changes to achieve the desired improvements. The FDIC should also take counsel from a recent decision on merger policy by the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") and follow suit. On February 18, 2025, in a well-reasoned statement, the DOJ and FTC explained the decision ***not to rescind*** the merger policy from 2023, saying:

> ***Stability is good for the enforcement agencies.*** The wholesale rescission and reworking of guidelines is ***time consuming and expensive*** . . . We should undertake this process sparingly. ***We have limited resources to patrol the beat and constant [policy] turnover undermines agency credibility***.[13]

BACKGROUND

The banking system has experienced consolidation for decades. Community banks—which make up a majority of the banks that the FDIC supervises—have been increasingly dwarfed by the growing count and share of assets held by the largest banks (see Chart 1).[14] Community banks' combined assets have stayed relatively stable during the last 30 years while the count of larger banks—those with more than $100 billion in total assets—have grown exponentially, from:

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9 Press Release, Federal Deposit Insurance Corporation, *FDIC Board of Directors Approves Proposal to Rescind 2024 Bank Merger Policy Statement* (Mar. 3, 2025), https://www.fdic.gov/news/press-releases/2025/fdic-board-directors-approves-proposal-rescind-2024-bank-merger-policy.

10 *See, e.g.*, Better Markets Comment Letter, *Request for Comment on Proposed Statement of Policy on Bank Merger Transactions* (June 18, 2024), https://bettermarkets.org/wp-content/uploads/2024/06/Better-Markets-Comment-Letter-FDIC-Proposed-Statement-of-Policy-on-Bank-Merger-Transactions.pdf.

11 *See, e.g.*, Final Statement of Policy on Bank Merger Transactions, *supra* note 3, at 79129.

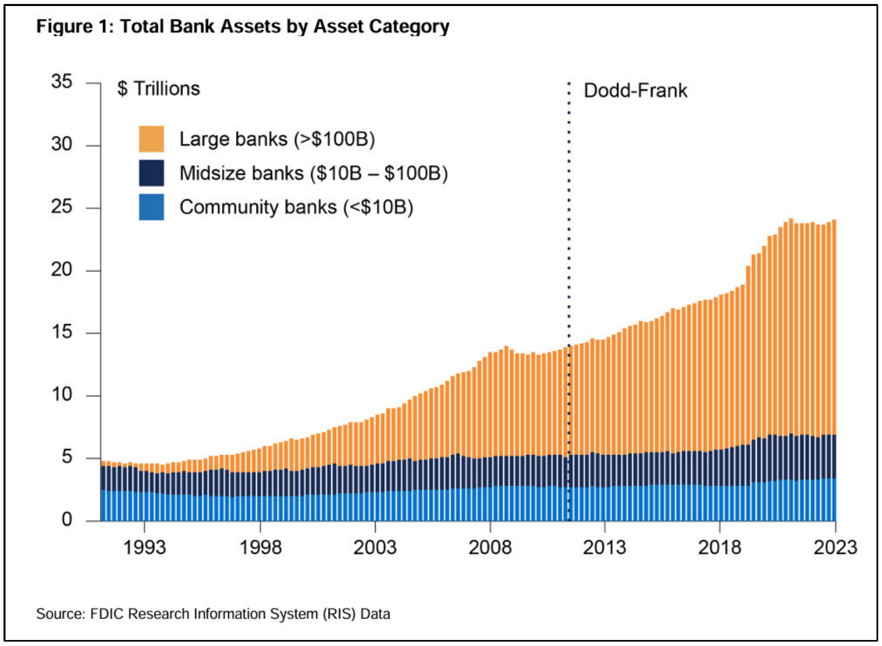
12 *Id.* at 79125.

13 Press Release, Federal Trade Commission, *FTC Chairman Andrew N. Ferguson Announces that the FTC and DOJ's Joint 2023 Merger Guidelines Are in Effect* (Feb. 18, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/02/ftc-chairman-andrew-n-ferguson-announces-ftc-dojs-joint-2023-merger-guidelines-are-effect (emphasis added).

14 Office of the Comptroller of the Currency, *Size, Complexity, and Polarization in Banking* 2 (July 17, 2024), https://www.occ.gov/news-issuances/speeches/2024/pub-speech-2024-79.pdf.

- Five large banks with combined assets of $800 billion in 1993, to
- Eighteen large banks with combined assets of $8.8 trillion in 2008, to
- Thirty-two large banks with combined assets of more than $17 trillion in 2023.

Chart 1



The pace of mergers increased substantially after Congress passed a law in 1994 that codified the right to interstate banking at a national level.[15] That consolidation became a frenzied merger wave after the 1999 Gramm-Leach-Bliley Act[16] repealed the portion of the Glass-Steagall Act of 1933[17] that required the separation of commercial banking, investment banking, and insurance, resulting in more than 30 banks being merged into just four gigantic, too-big-to-fail banks (See Chart 2).[18]

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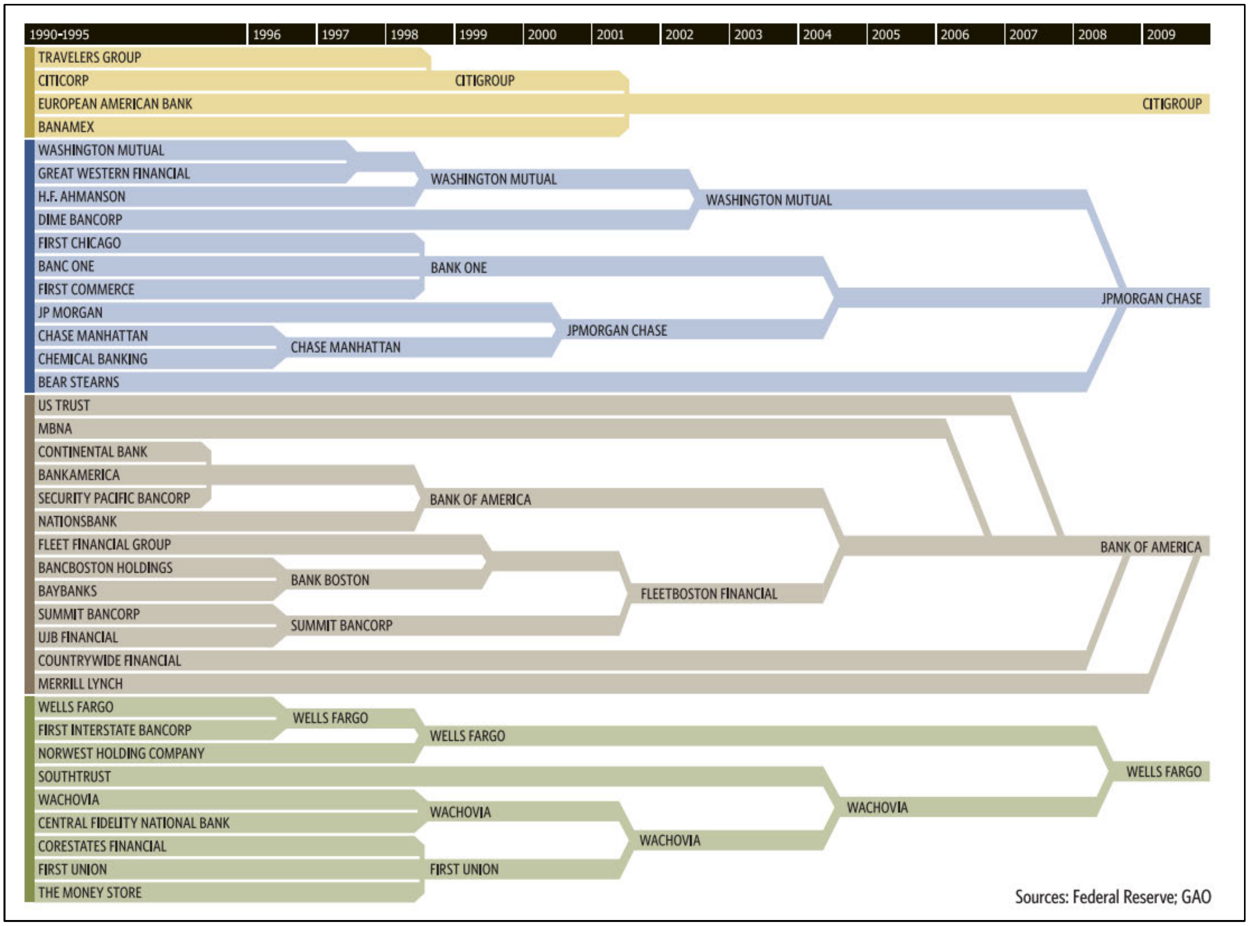
15 The Riegle-Neal Interstate Banking and Branching Efficiency Act, 12 U.S.C. § 1811.

16 The Gramm-Leach-Bliley Act, 15 USC § 6801-6809.

17 The Glass-Steagall Act of 1933, Public Law No. 66-73D.

18 *How Banks Got Too Big to Fail*, MOTHER JONES (Jan./Feb. 2010), https://www.motherjones.com/politics/2010/01/bank-merger-history/.

Chart 2



Confidential, back-room practices at the banking regulatory agencies that encourage and effectively grease the skids to make approval of merger applications a near certainty have also contributed to the merger volume:

> [A]gencies have encouraged consolidation . . . by manipulating their application procedures to cater to the banking sector. In the late 1990s, the agencies effectively stopped denying merger applications. Instead, when an agency discovers a problem with a merger proposal, it now informs the applicant of the issue and gives the bank an opportunity to withdraw its application. A voluntary withdrawal shields the bank from bad publicity and the negative market reaction a public denial might cause. This informal process, however, leaves no publicly available, written record of the deficiencies in the merger proposal. . . .
>
> The most significant end-run around the application process, however, occurs before a bank even executes a merger agreement. It is now common practice for the banking agencies to allow firms to vet potential deals confidentially before

> announcing a merger. In these private meetings, a bank may ask regulators whether they foresee potential barriers to approval of a transaction. If regulators raise a concern about a proposal, the bank might not pursue the merger. But when regulators express no reservations, the bank may enter into a merger agreement with the agencies' implicit blessing.[19]

The evidence shows that large bank mergers present serious risks and costs to financial stability as well as to consumers. For example, research from the Federal Reserve and other academics concludes:

> ***[D]istress at a single large bank poses a significantly greater threat to the economy than distress at several smaller banks with equivalent total assets.*** Meanwhile, large bank mergers pose serious integration risks and tend not to deliver promised efficiency gains or public benefits. Moreover, numerous empirical studies have found that bank mergers lower the availability and increase the cost of credit for borrowers, especially small businesses. And merging banks typically close branches, inconveniencing customers who rely on proximity to branch offices. In this light, the banking agencies' recent track record of quickly approving nearly every merger proposal suggests that they are neglecting their responsibility to consider all the statutory factors as Congress intended.[20]

These risks are not just theoretical. **The FDIC and other federal regulatory agencies have too often overlooked or downplayed the risks of consolidation and harmful outcomes of mergers that endanger the economy, financial system, and the American public.** Three examples illustrate these risks and prove why the FDIC should not revert to a weaker and less clear merger policy:

1. The FDIC failed to act in response to New York Community Bank's application to acquire Flagstar Bank.[21] After a year of no response, despite reports that indicate the FDIC had serious concerns about fair lending failings at Flagstar Bank, the banks changed their strategy and charter. They petitioned the Office of the Comptroller of the Currency ("OCC") for merger approval, which was eventually granted. More clear and decisive

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19 Jeremy C. Kress, *Modernizing Bank Merger Review*, 37 YALE J. ON REG. 435, 456–57 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3440914.

20 *Id.* at 439–40; *see also* Amy G. Lorenc & Jeffery Y. Zhang, *The Differential Impact of Bank Size on Systemic Risk* 12-18 FED. RESERVE BD. FIN. & ECON. DISCUSSION SERIES (2018), https://www.federalreserve.gov/econres/feds/the-differential-impact-of-bank-size-on-systemic-risk.htm; Arthur E. Wilmarth, Jr., *Too Big to Fail, Too Few to Serve? The Potential Risks of Nationwide Banks*, 77 IOWA L. REV. 957, 1010–12 (1992); Erik Devos *et al.*, *Efficiency and Market Power Gains in Bank Megamergers: Evidence from Value Line Forecasts*, 45 FIN. MGMT. 1011, 1029 (2016).

21 *See, e.g.*, Better Markets, *New York Community Bancorp: A Frankenstein Monster Federal Regulators Created* (Mar. 1, 2024), https://bettermarkets.org/wp-content/uploads/2024/03/Fact-Sheet-NYCB-Flagstar-Update-3-1-2024.pdf; *Flagstar Bancorp/New York Community Bancorp: When FDIC Rebuffed Merger Bid, Banks Restructured Deal So OCC Would Review It*, THE CAPITOL FORUM (Oct. 18, 2022), https://thecapitolforum.com/flagstar-bancorp-new-york-community-bancorp-when-fdic-rebuffed-merger-bid-banks-restructured-deal-so-occ-would-review-it/.

actions to convey the FDIC's concern could have prevented the regulatory arbitrage that occurred in this case and stopped fair lending violations that caused harm to innocent consumers. Furthermore, such action and regulator coordination could have prevented the systemic risk that Flagstar Bank now presents to the financial system and the American people after its mergers with both New York Community Bank and Signature Bank.

2. JPMorgan's acquisition of the failed First Republic Bank on May 1, 2023,[22] which resulted in JPMorgan growing by more than $220 billion, proves the need for stronger merger policy and coordination among the banking regulators. In this case, the OCC concluded that the merger transaction "does not increase risk to the stability of the United States banking or financial system as it facilitates the orderly resolution of an insured depository institution in default" and that the standard 10% deposit concentration limitation does not apply because First Republic Bank was in receivership.[23]

3. The proposed, and still pending, merger of Capital One and Discover will harm Main Street Americans, small businesses, the economy, the financial system, and financial stability.[24] It will reduce competition, provide less choice, enable higher fees and costs, and cause job losses. This merger would combine the 10th largest bank with the 26th largest bank to create the 6th largest bank as well as the largest credit card issuer in the U.S. Adding insult to injury, both Capital One and Discover have a long history of illegal, willful, deceptive, and unfair actions that have repeatedly consumed regulatory attention and often resulted in fines for both banks. While this merger decision is not within the FDIC's jurisdiction, the FDIC's decision on this Proposal will set the tone for merger policy more broadly.

Despite the serious risks detailed in this letter, some mergers can be beneficial for local communities, consumers, and small businesses. For example, research shows that community investment ***increases*** in areas where acquired community bank branches remain open, and the effect is stronger when a community bank is acquired by another community bank.[25] In other

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22 *See* Press Release, Federal Deposit Insurance Corporation, *JPMorgan Chase Bank, National Association, Columbus, Ohio Assumes All the Deposits of First Republic Bank, San Francisco, California* (May 1, 2023), https://www.fdic.gov/news/press-releases/2023/pr23034.html.

23 *Application by JPMorgan Chase Bank, National Association, Columbus, Ohio, Charter Number 8 to purchase certain assets and assume certain liabilities of First Republic Bank, San Francisco, California*, Office of the Comptroller of the Currency (May 1, 2023), https://www.occ.gov/topics/charters-and-licensing/app-by-jp-morgan-chase-bank.pdf.

24 *See, e.g.*, Better Markets Comment Letter, *Proposal by Capital One Financial Corporation to Acquire Discover Financial Services and Discover Bank, and for Discover Bank to Merge With and Into Capital One, National Association* (July 24, 2024), https://bettermarkets.org/wp-content/uploads/2024/07/Better-Markets-Comment-Letter-OCC-FRB-Capital-One-Discover-Merger.pdf.

25 Bernadette A. Minton, Alvaro G. Taboada, & Rohan Williamson, *Unexpected Gains: How Fewer Community Banks Boost Local Investment and Economic Development* (July 2024), https://www.communitybanking.org/-/media/files/communitybanking/2024-papers/unexpected-gains-community-banks-072924f.pdf?sc_lang=en.

words, community bank mergers can create larger and stronger institutions that contribute more to community development.

Overall, the important and unique role that large banks play in the financial system, along with the potential risks they can pose to financial and economic stability, justifies elevated scrutiny beyond companies in other industries.[26] This scrutiny protects the public and limits negative externalities.[27] Therefore, it is imperative that the FDIC not make the mistake of abruptly rescinding the 2024 Policy and failing to protect the banking system, financial stability, and the American public.

SUMMARY OF THE PROPOSAL

As referenced earlier, the Proposal[28] would replace the FDIC's 2024 Policy with the prior policy from 2008. The FDIC states that the two policies are "essentially identical."[29] We disagree; as detailed earlier in this letter, there are several key differences between the 2024 Policy and the 2008 Policy:

1. The 2024 Policy states that the post-merger bank would need to ***better*** meet the convenience and needs of the community and be financially ***stronger*** than the original entity.

2. The 2024 Policy contains a financial stability standard for merger transactions that result in a bank with more than $100 billion in total assets, which was not in the 2008 policy.

3. The 2024 Policy clarifies the FDIC's expectation that public hearings be held for mergers resulting in a bank with $50 billion or more in total assets.

These are critical differences, especially for larger banks that pose greater risks to taxpayers and should be required to meet socially and economically positive goals.

SUMMARY OF COMMENTS

As stated earlier in this letter, we strongly oppose the Proposal because it would move the Agency backward to a policy that is weaker, has less clarity, and will increase the risks to the system.

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26 *See, e.g.*, E. Gerald Corrigan, *Are Banks Special?*, Federal Reserve Bank of Minneapolis (Jan. 1, 1983), https://www.minneapolisfed.org/article/1983/are-banks-special; Mehrsa Baradaran, *Banking and the Social Contract*, 89 NOTRE DAME L. REV. 1283 (2014), https://scholarship.law.nd.edu/ndlr/vol89/iss3/6.

27 Kress, *supra* note 19, at 466.

28 Statement of Policy on Bank Merger Transactions, *supra* note 2, at 11679.

29 *Id.* at 11680.

To achieve the goal of a stronger and clearer merger policy, the FDIC should:

- Keep the 2024 Policy unchanged and intact while considering adjustments to improve and strengthen merger policy. While not perfect, the 2024 Policy contains vital components that relate to the impact of mergers on consumers, communities, and financial stability. The 2024 Policy also contains expectations to hold public hearings for mergers that would be consequential in size. The American people and the banking industry would be severely disadvantaged to hastily roll back the 2024 Policy and lose these vital inputs to merger decisions.

The FDIC's Proposal is limited to the act of rescinding the 2024 Policy, and it states that there will be a separate, future proposal to "comprehensively revise its merger policy."[30] Therefore, our comments in this letter are focused only on the decision to rescind the 2024 Policy and not on other changes that the FDIC should make related to its merger policy.

COMMENTS

I. KEEP THE 2024 POLICY UNCHANGED AND INTACT WHILE CONSIDERING ADJUSTMENTS TO IMPROVE AND STRENGTHEN MERGER POLICY.

The FDIC stated that the 2024 Policy was an improvement from the 2008 policy:[31]

> ***The [2024 Policy] updates, strengthens, and clarifies the FDIC's policies related to the evaluation of bank merger applications.*** As compared to the Superseded Statement, the Final Statement includes new content; is more principles-based; addresses jurisdiction and scope; describes the FDIC's approach to each statutory factor separately; and highlights other matters and considerations such as interstate mergers and the unique aspects of applications from non-banks, operating non-insured entities, and banks that are not traditional community banks. The Final Statement highlights the FDIC's expectations relative to each statutory factor and incorporates analytical considerations for these areas.[32]

Convenience and Needs of the Community

In the 2024 Policy, the FDIC is clearer than in prior policies with regard to its expectations that the post-merger bank must:

> ***[B]etter*** meet the convenience and the needs of the community to be served than would occur absent the merger . . .[33]

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30 *Id.* at 11679.

31 *Id.*

32 Final Statement of Policy on Bank Merger Transactions, *supra* note 3, at 79125 (emphasis added).

33 *Id.* at 79138 (emphasis added).

In both the 2008 and 2024 policies, the FDIC provides a list of ways in which this factor could be measured, including lending limits, banking products and services, and prices and fees.[34] As mentioned earlier, Better Markets had advocated for even greater clarity around appropriate metrics and time periods to use in the comparison of the pre-merger and post-merger conditions. While this suggestion was not incorporated in the final version of the 2024 Policy, the 2024 Policy is clearer with the statement that the post-merger bank needs to be ***better*** than the pre-merger bank with regard to these factors. The 2008 policy merely said these factors should be considered. Therefore, the 2024 Policy is different and an important improvement from the 2008 version.

Financial Stability

As the FDIC rightly identifies, the Dodd-Frank Act amended the Bank Merger Act and added financial stability as a factor that must be considered when assessing mergers.[35] The 2024 Policy provides several ways in which a merger's risk related to financial stability could be measured, including the size of the banks that are merging, their degree of interconnectedness with the banking or financial system, their complexity, and their cross-border activities.[36]

In the Proposal, the FDIC reasons that while these considerations are not in the 2008 Policy—because the Dodd-Frank Act did not yet exist—they are sufficiently covered in the FDIC's Applications Manual.[37] This is clearly not sufficient because an agency manual does not have the same weight as a policy that has been approved by the FDIC Board and passed through the rulemaking process. Therefore, the 2024 Policy is stronger.

Public Hearing

The 2024 Policy states that the FDIC expects to hold a public hearing for mergers that result in a bank with $50 billion or more in total assets, as well as in situations where the resulting bank is below this size threshold but presents a consumer protection risk.[38] While this is still a somewhat vague statement, it is an improvement from the 2008 Policy, which does not even mention public hearings.[39]

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34 *Id.*

35 *Id.* at 79139.

36 *Id.*

37 Statement of Policy on Bank Merger Transactions, *supra* note 2, at 11680.

38 Final Statement of Policy on Bank Merger Transactions, *supra* note 3, at 79127.

39 Statement of Policy on Bank Merger Transactions; Document Number: E8-2885; 73 Fed. Reg. 8870 (Feb. 15, 2008), https://www.federalregister.gov/documents/2008/02/15/E8-2885/statement-of-policy-on-bank-merger-transactions.

CONCLUSION

We hope these comments are helpful as the FDIC works to strengthen its merger policy.

Sincerely,

[redacted]

Shayna M. Olesiuk
Director of Banking Policy
[redacted]

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