KENNETH H. THOMAS, PH.D
www.CRAHandbook.com
[redacted]
MIAMI, FLORIDA 33156
[redacted]

MEMO

From: Kenneth H. Thomas, Ph.D.

To: FDIC Chair Jelena McWilliams via dbarr@fdic.gov
Federal Reserve Board Chair Jerome Powell via david.w.skidmore@federalreserve.gov
House Financial Services Committee Chair Maxine Waters via Twaun.Samuel@mail.house.gov
Fed merger comments @ comments.applications.@rich.frb.org
FDIC merger comments @ BankerMergerApplication@fdic.gov

Date: May 3, 2019

Re: Second Comment Recommending *Approval* of Proposed BB&T/SunTrust Merger *Conditioned* Upon Various Regulatory, Antitrust and CRA/Fair Lending Concerns

Please consider this my second formal comment recommending *approval* of the proposed BB&T/SunTrust ("Applicant") merger *conditioned* upon various regulatory, antitrust and CRA/Fair Lending concerns. Both of these banks have offices near me, although I do not have any personal or business relationships with either bank.

I have commented on most major bank merger in the U.S. since the 1990s, and, rather than protests or challenges, they have all been comments recommending approval *conditioned* upon one or more convenience and needs or similar issues consistent with good public policy. That is once again the case with this current merger where I am recommending conditional approval.

1. *Failure of Applicant to Respond to My First Comment that the Federal Reserve Rather Than the FDIC Should Be the Primary Federal Regulator of the Resultant Bank.*

My first comment dated March 18, 2019 brought up a very serious regulatory question that was totally ignored in the Applicant's April 23, 2019 "Submission Addressing Concerns in Comments…" of the subject applications. The fact is they only addressed *selected* concerns.

My first comment recommended an approval conditioned upon the Federal Reserve being the primary federal regulator of the resultant bank. The basis for this recommendation was provided in that comment as well as in the February 13, 2019 *American Banker* BankThink article titled "Fed, not FDIC, should regulate a merged BB&T-SunTrust."

Applicant's April 23 submission addressed concerns about seven competitive, service, CRA, Fair Lending, and related convenience and needs issues. Unfortunately, it was totally silent on what is perhaps the most important regulatory issue involving the convenience and needs factor, namely the primary federal bank regulator of the resultant bank.

The Applicant made the decision to select the FDIC as its primary federal regulator. My comment and referenced article documented multiple cases of favoritism by the FDIC towards BB&T, the dominant bank in this merger, so their decision was not a surprise.

For that reason and also because the resultant bank will be, by far, the largest "customer" of the FDIC (to use the Comptroller's reference to OCC-regulated banks), every compliance and safety and soundness decision the FDIC will make in the future about the resultant bank could potentially adversely impact the convenience and needs of the communities served by the combined bank.

Considering this is perhaps the single most important regulatory issue in this merger, it is shocking that it was not discussed as a priority item in the two public hearings. Perhaps this is why the Applicant's attorneys decided not to address my comment in their April 23 response?

There is, however, no reason why the FDIC and Fed should ignore my comment if they are truly acting in the public interest in their evaluation of this proposed merger. The FDIC, however, is clearly conflicted in this regard, since my comment and article reach the logical conclusion that the resultant bank is simply Too Big To Regulate by the FDIC. For this reason, it is irrelevant whether or not the FDIC has a full-five member board to issue a ruling on this merger, since they are certain to rubber stamp this deal to result in what will be their largest regulated bank by far.

It is therefore up to the Fed and perhaps concerned members of Congress to make sure the public interest is protected in this deal by insisting on the Fed becoming the primary federal regulator of the resultant bank, as is presently the case for SunTrust Bank. That is why I am copying House Financial Services Chair Maxine Waters.

While the selection of a primary federal regulator has always been a perk to the highly-regulated banking sector, an exception must be made in this instance because of the overriding public good *This is therefore the single most important condition of approval of this merger.* The remainder of this comment will address other relevant concerns.

The Applicant Should Be Required to Disclose its Confidential Competitive Memorandum so the Public has an Opportunity to Independently Evaluate Whether or Not There is an Adverse Competitive Impact of This Merger in Any of the 80 Overlapping Markets

The April 23 letter by Applicant's attorneys and the application itself repeatedly state that the proposed transaction will not have a substantial adverse effect on competition in any of the Fed-defined 80 banking markets in which there is branch overlap by the merging banks.

Unfortunately, the Applicant's "Public Memorandum on Competitive Considerations and Statistical Annex" dated March 8, 2019 in the public file does not disclose critical data to properly evaluate whether or not this proposed transaction is in the public interest in terms of relevant antitrust considerations.

Specifically, by only including a list of banks in each of the 80 markets with various deposit weightings and a resultant pre- and post-merger HHI calculation, there is no information on what adjustments, if any, were made for large offices with substantial nonlocal deposits in key markets.

Also, there was no relevant discussion of aggravating or mitigating factors in each market or the impact of other relevant factors unique to each market. Most importantly, there was no information on proposed divestitures in each market in the public filing. All of this critical information is included in the *Confidential* Memorandum on Competitive Considerations.

The Applicant's Public Memorandum on page 3 in footnote 4 acknowledges the importance of properly considering nonlocal deposits in an antitrust analysis:

> *And because deposits are reported according to "internal record-keeping practices," there is inconsistency across banks for how national or digital relationships should be housed. For example, online and national accounts tend to be booked in large headquarters branches, even if those deposits have no relationship to the local market.*

That memorandum further states that:

> *Finally, both the Board and DOJ have long acknowledged (and the courts have confirmed) that a deposit-based analysis cannot provide an accurate picture of the state of competition in a local banking market if business line or other deposits by customers booked in the market but unrelated to the local market are included in the analysis.*

For example, in the Applicant's future home market of Charlotte, the public memorandum reports that Bank of America has a 75.2% totally weighted share of that market (see last column below) with $160 billion of deposits in 56 offices as of June 30, 2018. Wells Fargo ranked second in market share at 14.6% with 78 offices reporting $31 billion of deposits, but this includes the former main office of Wachovia Bank (First Union).

This two tables below are excerpted from the two pages in the public memorandum with information on the Charlotte market:

Depository Institutions and Market Share
Deposits as of June 30, 2018 ($000)
Ownership updated for completed transactions to February 8, 2019

Company	Type	Branches	Share	Total Deposits	Share	SBs, S&Ls Weighted 50%	Share	SBs, S&Ls Weighted 50% 2% Thrifts 100%	Share
Charlotte, NC-SC Fed Banking Market									
Bank of America Corporation	Bank	56	11.89	160,173,659	75.14	160,173,659	75.21	160,173,659	75.21
Wells Fargo & Company	Bank	78	16.56	31,217,331	14.64	31,217,331	14.66	31,217,331	14.66
BB&T Corporation	Bank	62	13.16	5,986,424	2.81	5,986,424	2.81	5,986,424	2.81
Fifth Third Bancorp	Bank	37	7.86	3,098,318	1.45	3,098,318	1.45	3,098,318	1.45
First Citizens Bancshares, Inc.	Bank	41	8.70	2,402,146	1.13	2,402,146	1.13	2,402,146	1.13
SunTrust Banks, Inc.	Bank	27	5.73	1,807,011	0.85	1,807,011	0.85	1,807,011	0.85
Total		471	100.00	213,163,249	100.00	212,969,532	100.00	212,969,532	100.00
BB&T Corporation	Bank	62	13.16	5,986,424	2.81	5,986,424	2.81	5,986,424	2.81
SunTrust Banks, Inc.	Bank	27	5.73	1,807,011	0.85	1,807,011	0.85	1,807,011	0.85
Post Merger		89	18.90	7,793,435	3.66	7,793,435	3.66	7,793,435	3.66
Pre-merger HHI		834.4		5,873.8		5,884.4		5,884.4	
Change		150.9		4.8		4.8		4.8	
Post-merger HHI		985.3		5,878.5		5,889.2		5,889.2	

These combined 134 offices of the two largest banks in this market, also two of the largest in the nation, reported some $191 billion of deposits totaling about a 90% market share; this averages to about $1.4 billion of deposits per office. This is a totally unrealistic average office size, which normally is in the $25 to $50 million range in smaller markets and in the $50 to $100 million range in larger markets like Charlotte, but nothing close to $1.4 billion.

For example, the 62 offices of BB&T, the third largest bank in the market, with but a 2.8% share, represents $6.0 billion in deposits for an average office size of $96 million. Fifth Third ranks fourth with a 1.5% share with 37 offices and $3.1 billion of deposits for an average office size of $84 million. First Citizens ranks fifth in market share at just 1.1% with 41 offices and $2.4 billion of deposits and an average office size of $59 million. SunTrust ranks sixth in market share at .85% with 27 offices holding $1.8 billion of deposits with an average office size of $67 million.

Thus, putting aside the two largest banks in this market, among the two largest in the nation, the average office size of the next four largest banks, including both BB&T and SunTrust is roughly $80 million. Even if we were to round it up to the highest average office size of $100 million, this would mean that the estimated local deposits in this market would be $5.6 billion for Bank of America's 56 offices and $7.8 billion for Wells Fargo's 78 offices using the average office size for those banks.

Instead of these two giant banks having a combined $191 billion of local deposits, this would mean something closer to $13.4 billion. This suggests as much as $178 billion of the $191 billion of deposits may be nonlocal deposits based on this methodology. So, instead of Charlotte being a $213 billion market, making it one of the largest in the nation, it is probably closer to a $35 billion market based on local deposits estimated in this manner. If this were the case, the merged bank with $7.8 billion of deposits would be the largest in the market tied with the adjusted Wells Fargo Bank.

If a similar type of nonlocal deposit adjustment was done in the other 79 impacted markets, this would result in a whole new set of HHI calculations which could potentially result in a higher amount of required divested deposits by the Applicant.

The Applicant would, of course, argue that such nonlocal deposit adjustments are inappropriate and that there would be many mitigating factors, such as internet banking, in favor of minimizing any additional deposit divestitures.

Nonetheless, the public should be able to review any such HHI calculations, nonlocal deposit adjustments, mitigating factors, and all other facts of record in the Confidential Competitive Memorandum to make a proper evaluation of whether or not the Applicant is correct in the finding that the proposed merger would not have a substantial adverse impact on competition in any market.

The only alternative available to the public at this time are estimates done by outside parties on proposed divestitures. For example, S&P Global Market Intelligence estimated that about $1.3 billion of deposit divestitures in 11 MSAs may be required from the regulatory analysis of this deal.

Rather than relying on such outside sources, it would be far better for the Fed to require that the above critical information in the Confidential Competitive Memorandum be available so everyone would have an opportunity to properly evaluate the competitive impact of this merger.

The following table is an excerpt from the above referenced analysis by S&P Global Market Intelligence identifying 11 MSA that may require divestiture following the subject merger:

MSAs that may require divestiture following BB&T-SunTrust merger

	Active branches (actual)		Deposits		
MSA	BB&T Corp.	Pro forma	BB&T Corp. ($M)	Pro forma ($M)	Divestiture required ($M)
Virginia Beach-Norfolk-Newport News, VA-NC	42	75	3,206.6	7,328.0	432.1
Winston-Salem, NC	22	32	25,356.3	26,040.7	245.6
Durham-Chapel Hill, NC	13	31	1,327.8	3,576.8	191.3
Macon-Bibb County, GA	6	12	460.6	1,053.4	143.5
Martinsville, VA	4	6	242.6	439.7	95.2
Oxford, NC	1	3	116.0	230.8	67.0
Milledgeville, GA	2	3	120.6	227.0	30.7
Roanoke, VA	10	24	879.3	2,265.5	28.2
Jesup, GA	1	2	47.1	83.8	16.5
Shelby, NC	3	4	165.3	253.2	9.6
Charlottesville, VA	11	16	769.1	1,375.7	1.6
Total	**115**	**208**	**32,601.3**	**42,875.5**	**1,270.4**

Data compiled Feb. 7, 2019.
HHI = Herfindahl-Hirschman Index; MSA = metropolitan statistical area
Analysis limited to markets where a deposit divestiture may be required post acquisition.
Data based on the FDIC's June 30, 2018, Summary of Deposits filing and adjusted for completed and announced mergers and acquisitions and any branch openings or closings as of Feb. 7, 2019.
Branch data collected on a best efforts basis.
For the purpose of this HHI analysis, banks are weighted at 100%, while thrifts and savings banks are weighted at 50%. A divestiture is required when the total market HHI crosses 1,800 and changes by 200 as a result of the acquisition.
Post-merger target company's branches are weighted using the buyer's company type; others might employ methodologies that differ from this.
Source: S&P Global Market Intelligence

The Federal Reserve Should Conduct an Independent Review of BB&T's Most Recent CRA Exam

BB&T's most recent CRA Performance Evaluation (PE) released on May Day 2018 resulted in an outstanding rating, despite the fact that they were once again (during the 2008 exam) found to have engaged in a "substantive violation of Regulation B, which implements the Equal Credit Opportunity Act."

My previous comment summarized several reasons why the FDIC *inflated* BB&T's current CRA rating from a Satisfactory to an Outstanding one:

1. The above- cited fair lending violation in the exam should have resulted in a one-rating downgrade as was the case in BB&T's 2008 exam and most other FDIC exams, consistent with FDIC examination procedures. However, in an apparent accommodation to its largest "customer," the FDIC stated that "a downgrade of the CRA rating to less than Outstanding was not warranted" based on the Bank's "CRA performance, extent and impact of the finding, and immediate corrective actions taken."

2. BB&T received a "high satisfactory" rating on the 50% weighted Lending Test and Outstanding ratings on the 25% weighted Investment and Service Tests. Many banks receiving such a "50-50" ratings mix from the FDIC receive an overall Satisfactory rather than Outstanding rating, because of the importance of the Lending Test, especially when there is a serious fair lending violation.

3. BB&T received an inflated Outstanding rating on the Investment Test, since qualified investments during the Review Period amounted to only 0.7% of total assets, which is below the 1% Outstanding benchmark in The CRA Handbook and below the comparable percentage of many other banks receiving Outstanding ratings from the FDIC.

4. BB&T received an inflated Outstanding rating on the Service Test, since their cited 5,728 Community Development Services is about 2,000 services below the Outstanding benchmark based on my detailed CRA research summarized in my recent CRA reform comment.

The Fed would be in the best position to provide a more objective regulatory evaluation of BB&T's CRA performance, and this should be a condition of approval of the proposed merger. Even with the proper rating of Satisfactory, this would not derail the proposed merger.

However, it would provide an independent and proper public evaluation of BB&T's CRA performance for the subject Review Period and also support the view why the Fed rather than the FDIC should be the primary federal regulator of the resultant bank.

The Federal Reserve Should Conduct a Comprehensive Fair Lending Review of BB&T

It is unprecedented that one of our nation's largest banks, soon to be the dominant bank in the largest bank merger in recent history resulting in our nation's sixth largest bank, would be found in "substantive violation of Regulation B, which implements the Equal Credit Opportunity Act" for *two* recent Review Periods.

For the reasons noted above and in my previous comment, the FDIC would not be able to complete an objective and comprehensive Fair Lending Review of BB&T. This is why the Fed must do such a review, covering those previous Review Periods up to the present time, and then make the results public.

If the Fair Lending Review finds further substantive or other Fair Lending violations, then an additional condition of the proposed merger should be the remediation of these issues and a submitted Fair Lending Plan to avoid those problems in the future.

The Applicant has proposed a "Community Benefits Plan" (see below) to help get this merger approved, but what good are such benefits to the community if they are not provided in a *fair* manner, especially benefits involving lending, the main business of banking.

The Federal Reserve Should Require BB&T and SunTrust to Disclose All Past, Present and Planned Contributions and Other Benefits to Community Groups and Nonprofits as Part of the Evaluation of This Merger

Applicant proposed a "Community Benefits Plan," which reportedly was based on a series of meetings with community group leaders and other efforts. As in the case of previous megamergers, such plans, which are not required by CRA or any other law, are primarily efforts to expedite the merger, a form of WD-40 to help quiet potentially squeaky community groups that might consider protesting the merger. Otherwise, why wouldn't such a plan have been created as part of each bank's past community service and development efforts prior to the merger?

Applicant further stated that they plan to create a Community Advisory Board of such leaders and further engage in "philanthropic giving" as part of this plan. In the spirit of full disclosure and transparency that would be consistent with the GLB Act's "sunshine" provisions, Applicant should be required to disclose all past, present and especially planned financial and other contributions and benefits to any nonprofits in its market area.

Applicant's public file contains many supportive letters from community groups and other nonprofits, but how many of those groups received past contributions or have been promised future ones by either BB&T or SunTrust? In fact, the article about the second and final hearing today noted that some community organizers "spoke of the extensive financial support they have received over the years from the two banks."

While such community support is to be commended, the FDIC and Fed, as independent decision makers representing the public interest on this merger, must consider the source of commenters, especially those receiving extensive financial support from the Applicant.

Actually, the Fed should have required each community group or person appearing at the Public Hearings to disclose upfront whether or not they have any past, present or future financial or other relationship in the form of such contributions or otherwise with either bank or their affiliates.

The Fed should also compile a list of community groups and coalitions that challenged bank mergers since 2000 to see if any of them are being silent or undecided on this one, considering this is the biggest bank merger since the financial crisis resulting in what will be the nation's sixth largest bank. The Fed should then determine if their silence or indecisiveness in the present case may be related to the whether or not they or their affiliates or leaders or anyone related to them have benefited from past, present or planned contributions or business relationships.

Once the Applicant has made public its Community Benefits Plan, the Fed should likewise determine which community groups or coalitions or their affiliates are getting any financial or other benefits from this plan, and then determine whether or not they have supported or opposed the merger.

Summary: This Merger Approval Must be Based on the Following Conditions:

1. *The Federal Reserve rather than the FDIC should be the primary federal regulator of the resultant bank.*

2. *The Applicant should be required to disclose its Confidential Competitive Memorandum so the public has an opportunity to independently evaluate whether or not there is an adverse competitive impact of this merger in any of the 80 overlapping markets*

3. *The Federal Reserve should conduct an independent review of BB&T's most recent CRA exam.*

4. *The Federal Reserve should conduct a comprehensive Fair Lending Review of BB&T.*

5. *The Federal Reserve should require BB&T and SunTrust to disclose all past, present and planned contributions and other benefits to community groups and nonprofits as part of the evaluation of this merger.*

Good public policy dictates that all of the above conditions must be fulfilled prior to this merger being approved. Otherwise, this proposed merger will NOT be meeting the required Convenience and Needs factor for approval and will certainly NOT be in the public interest.