BETTER
MARKETS

May 31, 2022

TO: James P. Sheesley
Assistant Executive Secretary
Attention: Comments—RIN 3064-ZA31
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

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

Dear Ladies and Gentlemen:

Better Markets[1] appreciates the opportunity to comment on the rules, regulations, guidance, and statements of policy (together, "regulatory framework") that apply to bank merger transactions involving one or more insured depository institutions, in particular regarding the questions the Federal Deposit Insurance Corporation ("FDIC") has posed to the public. Better Markets urges the federal banking regulatory agencies and the Department of Justice (collectively, "the agencies") to work together to modernize and strengthen the merger review guidelines by implementing the enhancements outlined in this letter.

Background

An insufficient merger review process, combined with other factors such as changes in laws and economic events, has contributed to massive consolidation in the banking industry over the last three and a half decades. Since the mid-1980s, the number of commercial banks has declined by around 70 percent. The pace of mergers increased substantially after Congress passed a law in 1994 that codified the right to interstate banking at a national level.[2] Additionally, the

[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, one that protects and promotes Americans' jobs, savings, retirements, and more.

[2] The Riegle-Neal Interstate Banking and Branching Efficiency Act, 12 USC 1811

2008 global financial crisis resulted in government-brokered takeovers of large, failing Wall Street banks by already too-big-to-fail banks.[3]

There has also been a consolidation of banking and other financial activities. In 1999 the Gramm–Leach–Bliley Act repealed the portion of the Glass-Steagall Act of 1933 that required the separation of commercial banking, investment banking, and insurance, setting off mega-mergers between these three types of companies, greatly exacerbating the too-big-to-fail problem, and creating a too-big and too-complex-to-manage problem.[4] For example, about 30 banks had consolidated into just four gigantic, too-big-to-fail banks by the time of the 2008 financial crisis.

The consolidation both in the number of banks and in products and services has completely changed the landscape of the U.S. banking industry, reducing competition and concentrating risks into systemic concerns. Currently, the very largest banks virtually control the U.S. banking system:

- The top four banks hold about half of all assets in the banking system.
- The top ten banks hold almost half of all deposits and loans.
- JPMorgan Chase, Goldman Sachs, Bank of America, and Citigroup hold about 90% of the total notional amount of all derivatives contracts.

The process to assess merger and acquisition applications involves the consideration of four main factors:

1. anticompetitive effects,
2. financial stability risks,
3. effect on the public interest/ convenience and needs of communities served, and
4. the financial condition and management effectiveness at the merging companies.[5]

Yet none of these factors seem to slow the pace of mergers. This includes the two largest bank mergers since the 2008 Global Financial Crisis that have occurred over the last three years. The resulting banks have assets over $250 billion but are not formally classified as systemically important, putting them in a group of banks that the deregulatory actions of the last four years has affected the most.[6] BB&T and SunTrust banks merged in 2019 (renamed Truist Financial) to become the tenth largest bank holding company at over $500 billion in assets. PNC Bank closed its acquisition of the US operations of BBVA last year and is now the ninth-largest bank holding company with around $560 billion in assets.

[3] Bank of America acquired Merrill Lynch and Countrywide Financial; JPMorgan Chase acquired Bear Stearns and Washington Mutual; Wells Fargo acquired Wachovia.

[4] See Better Markets Fact Sheet, *Glass-Steagall Financial Reform Law and Efforts to Reinstate It* (July 29, 2015), https://bettermarkets.com/sites/default/files/Better%20Markets%20Fact%20Sheet%20on%20Glass-Steagall%20_0.pdf

[5] 12 USC 1828(C)

[6] See Better Markets whitepaper, Dennis Kelleher and Tim Clark, *No Financial Crash Yet Thanks to Dodd-Frank and Banking Reforms* (June 24, 2020), https://bettermarkets.com/resources/white-paper-no-financial-crash-yet-thanks-dodd-frank-and-banking-reforms.pdf

Two other mergers are currently being considered that involve very large banks, and the resulting banks would be even bigger than Truist or PNC. U.S. Bancorp ($573 billion in total assets) has applied to acquire MUFG Union Bank ($163 billion in total assets), creating a bank that would be $736 billion in size which would be the seventh-largest bank holding company right after Morgan Stanley by current figures. Also, TD Group US Holdings ($524 billion in total assets) has applied to acquire First Horizon Corporation ($89 billion in total assets), creating a bank that would be $613 billion in size, which would be the eighth-largest bank holding company by current figures.

Mergers of large banks can increase financial stability risks and harm hardworking Americans and small businesses. They can lead to a reduction in consumer banking products and services, increased costs associated with products and services,[7] or even a lack of access altogether when branches are closed. These effects can hurt any American financially, but they are especially harmful to low-income individuals and communities. With insufficient access to banking services, there is an increased use of alternative financial services such as check cashing or payday loans. Additionally, the size of[8] and access to[9] small business loans decline with larger banks, making it more difficult to open or sustain a successful small business. This can have strongly negative long-term impacts on employment and wealth within low-income communities if these communities are not able to create and sustain local businesses that can generate higher incomes for community residents[10] and residents are unable to access credit to build wealth.

Response to Question 1: The Agencies Must Consider Factors Other than Competition More Fully. The Laws Require the Agencies to Consider Other Factors and Provide the Agencies with Broad Discretion as to How to Do So.

The current merger review process ostensibly prioritizes the factor of anticompetitive effects, seemingly in line with the implied prioritization of the applicable laws: the Bank Holding Company Act and the Bank Merger Act. These laws are specific that a merger should not be approved if it could lead to a monopoly or if it would substantially lessen competition. However, the laws also grant the agencies substantial discretion as to how to include the non-competition factors (financial stability, community needs, and financial and managerial resources), directing the agencies to "consider" them in the review process. This discretion allows the agencies to

[7] *See* Vitaly M. Bord (2018). Working Paper. "Bank Consolidation and Financial Inclusion: The Adverse Effects of Bank Mergers on Depositors [Job Market Paper]". Harvard University. https://scholar.harvard.edu/files/vbord/files/vbord_-_bank_consolidation_and_financial_inclusion_full.pdf.

[8] An examination of national data from the Federal Financial Institutions Examination Council on assessments related to the Community Reinvestment Act shows that the average small business loan size decreases significantly across bank groupings of increasing size.

[9] *See* Vitaly M. Bord, Victoria Ivashina, Ryan D. Taliaferro (2018). "Large Banks and Small Firm Lending." National Bureau of Economic Research, Working paper 25184. https://www.nber.org/papers/w25184; *also see* Achraf Mkhaiber and Richard A. Werner (2021). "The relationship between bank size and the propensity to lend to small firms: New empirical evidence from a large sample." Journal of International Money and Finance, Vol. 110:102281. https://doi.org/10.1016/j.jimonfin.2020.10228.

[10] *See* David A. Fleming and Stephan J. Goetz (2011). "Does Local Firm Ownership Matter?" Economic Development Quarterly Vol. 25, Issue 3. https://doi.org/10.1177%2F0891242411407312.

elevate the non-competition factors to their appropriate role in the merger review process, and they should do so as soon as possible before more mega-mergers are considered.

President Biden's Executive Order[11] from last year highlighted the many detrimental impacts of consolidation throughout the economy, including in banking and the financial industry. That order encouraged the Attorney General to engage with the banking regulatory agencies to review guidelines around bank mergers for the "revitalization" of the merger oversight process. The agencies should be embracing the opportunity to engage with each other to enhance the merger review processes in a coordinated way, particularly along the dimensions of the public interest and financial stability, taking into account the effects of recent deregulation. Given that the law already requires the agencies to consider other factors and grants them broad authority as to how to do so, this could and should be done, especially regarding financial stability, community needs, and the adequacy of banks' financial and managerial resources.

For community needs, the current review process relies heavily on the outcomes of the Community Reinvestment Act (CRA) assessments of the merging entities. Indeed, in both orders approving the SunTrust/ BB&T merger and the PNC/ BBVA merger, the Federal Reserve noted that it "places particular emphasis on the records of the relevant depository institutions under the CRA."[12] This reliance has been shown to be similar for all three federal banking agencies.[13] There are issues with such reliance, but the largest is that CRA assessments are point-in-time and conducted periodically with data from prior years. For example, the most recently available CRA examination for a merger review being conducted this year could be from 2019, which would have been conducted with data from 2016-2018. Therefore, conclusions reached in a CRA examination could be grossly out of date. Furthermore, there is no consideration of how performance of the merged institution could be in the future. That is, two separate institutions may indeed be performing well in serving the needs of communities at the time of the merger assessment, but that is no guarantee that they will or plan to continue to do so.

To compensate for this in some merger reviews, especially larger mergers, the review process includes a request for comments from the public as well as a review of and response to those comments. In those cases, the public comments usually include comments that oppose the merger, express concerns about the merging institutions or the eventual merged institution, or request that commitments be made by or modifications made to the merging institutions as conditions for approval. However, comments are not a substitute for an up-to-date CRA

[11] President Joeseph Biden (July 9, 2021), *Executive Order on Promoting Competition in the American Economy*, Presidential Actions, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

[12] *See* Federal Reserve Board Order No. 2019-16 (November 19, 2019) approving the merger between BB&T Corporation and SunTrust Banks, Inc., https://www.federalreserve.gov/newsevents/pressreleases/files/orders20191119a1.pdf; *also see* Federal Reserve Board Order No. 2021-04 (May 14, 2021) approving the acquisition of BBVA USA Bancshares, Inc. by PNC Financial Services Group, Inc., https://www.federalreserve.gov/newsevents/pressreleases/files/orders20210514a1.pdf.

[13] *See* Jeremy C. Kress, "Modernizing Bank Merger Review," Yale Journal on Regulation 37 (2) (2020): 435-498, https://www.yalejreg.com/print/modernizing-bank-merger-review/.

examination, especially since the review and assessment of comments relies – seemingly, from the approval orders, in large part – on responses from the banks themselves and a thinly-supported, subjective assessment by the agencies. More must be done with regard to the convenience and needs factor (discussed below in the response to Question 4).

Similarly, the factor of financial stability does not receive appropriate scrutiny. A review of merger approval documentation for larger mergers that have been assessed by the Federal Reserve and the OCC shows that the financial stability/systemic risk review involves an "analysis" along with the five factors that are used to determine the "score" assigned to Global Systemically Important Banks (the so-called GSIB surcharge score): size, availability of substitute providers, interconnectedness, complexity, and the extent of cross-border activities. However, the analysis for each of the five factors is a simple comparison of the merged institution relative to the total industry, which of course includes the largest, most complex banks. The analysis also includes a GSIB surcharge score for the merged entity, and that score is compared to the banks that are officially designated as GSIBs.

Again, only a subjective assessment is made for each of the metrics. The agencies do not provide or utilize quantitative thresholds for further consideration and scrutiny of the merger with regard to financial stability concerns. Even the subjective assessments lack the type of robust justification that would be expected for a factor as significant as stability of the U.S. financial system. While the GSIB surcharge scoring methodology provides a useful, very high-level framework for determining a capital surcharge, it is a crude framework that provides little insight into the many ways risks could be posed to the banking system and greater financial system by a large bank. The agencies must consider the inclusion of a more thorough and deeper analysis of financial stability risks (discussed below in response to Question 2).

Response to Question 2: The Review Process Must Consider More Seriously the Risks to Financial Stability of the Merged Institution.

The agencies have a duty to assess the financial stability risks resulting from the mergers they review. Systemic and financial stability risks deserve special scrutiny, especially considering the weakening of the regulatory framework implemented during the Trump era. Strengthening the merger review process around financial stability risks is necessary regardless of the regulatory framework, but the dilution of post-crisis reforms provides even more reason to do so.

Governor Lael Brainard recognized this issue in a statement made after her abstention from voting on the PNC acquisition of the U.S. operations of BBVA:

> "The increases in banking concentration in the $250 to $700 billion asset size category, where common-sense safeguards have been weakened, raise some concerns, and it might be helpful to undertake a broader review of our framework, since we know from experience even

> noncomplex banks in this size range can pose risk to the financial system when they encounter financial distress."[14]

Clearly, the agencies must do a better job of identifying and assessing systemic risks and financial stability concerns related to merger plans for large banks. The GSIB surcharge analysis discussed above is grossly insufficient for these purposes. The GSIB surcharge framework was not designed to assess potential risks to the financial system. Rather, it was designed to apply a capital surcharge to the world's largest and most complex banking institutions. As Governor Brainard pointed out, smaller and less complex institutions that are still large by any standard can pose risk to the financial system. Therefore, comparing any potentially merged bank to GSIBs is not a worthwhile exercise, unless one or more of the merging banks is already a GSIB. Even in that case more factors and information must be considered in the process. Former Governor Daniel Tarullo aptly described the current process as "analytically underdeveloped."[15]

First, for mergers that result in an institution above $250 billion, the agencies should require the submission of a combined resolution plan for the merged entity.[16] Such a plan would provide great insight into the complexity of the merged entity and its operations and allow for a more involved and appropriate assessment of the implications of its failure. After all, that is exactly the purpose of the resolution plan requirements, and so a combined plan should be required to be submitted and utilized for assessment in the merger review process. Making large banks prepare for their possible resolution is critical to addressing the too-big-to-fail problem.

In a recent speech, Acting Comptroller of the Currency Michael Hsu suggested that one way to address systemic risk of large mergers would be to "condition approval on credible and verifiable commitments to achieving resolvability, tailored to the resolution risks of the resulting bank."[17] The best way to ensure this occurs is by having a resolution plan in place for the merged entity at the time of the application process, which is important for banks that are large enough to pose risk to the system, including large banks that are not GSIBs. As the Acting Comptroller also points out in that speech, if the only way to resolve a large regional is that "it would have to be sold to one of the four megabanks, then…we have a financial stability problem." Resolution preparedness is necessary to have confidence that large banks can be shut down and/or be taken

[14] Governor Lael Brainard (May 14, 2021), *Statement on PNC/BBVA Application by Governor Lael Brainard*, Board of Governors of the Federal Reserve System, https://www.federalreserve.gov/newsevents/pressreleases/brainard-statement-20210514.htm.

[15] Daniel K. Tarullo (March 16, 2022), *Regulators should rethink the way they assess bank mergers*, Brookings Institution, https://www.brookings.edu/opinions/regulators-should-rethink-the-way-they-assess-bank-mergers/.

[16] Note that this requirement would also serve as a response to the last question that is part of Question 9 in the request for information "Are there attributes of GSIB resolvability, such as a Total Loss-Absorbing Capacity (TLAC) requirement, that could be put into place that would facilitate the resolution of a large insured depository institution without resorting to a merger with another large institution or a purchase and assumption transaction with another large institutions?"

[17] Acting Comptroller of the Currency Michael J. Hsu (May 9, 2022), "Bank Mergers and Industry Resiliency," Office of the Comptroller of the Currency, https://www.occ.gov/news-issuances/speeches/2022/pub-speech-2022-49.pdf.

apart and sold off piece-by-piece more easily in the event they do fail instead of being sold off in whole to a megabank.

Second, for mergers that result in an institution above $250 billion, more analysis must be conducted to assess risk to financial stability other than simply utilizing the GSIB surcharge metrics. As noted above, these metrics as compared to the industry as a whole or as compared to GSIBs are insufficient to determine the possible risks an institution could pose to the financial system. The Federal Reserve has a division entirely dedicated to the analysis of financial stability – the Division of Financial Stability. For large mergers, the Division of Financial Stability should conduct and provide a public assessment of the financial stability concerns the merged entity could raise on its own and in the context of the banking system and greater financial system.

At the very least, an assessment should be conducted of the potential impact to funding markets that would be caused by serious distress or failure of the merged bank. It is important to remember that in 2008 Bear Stearns was around $400 billion in assets when it required a Federal Reserve-brokered (and materially supported) fire sale, and Lehman Brothers was around $640 billion at the time it collapsed. These firms would not have been classified as GSIBs, but their distressed financial condition significantly contributed to stress in short-term funding markets, which are critical to the functioning of the financial system.

Response to Question 3: Identified Weaknesses in Prudential Factors Should Prevent A Merger Approval.

Consideration of prudential factors should be a major element of any decision making on mergers of large banks, and if there are significant weaknesses in key areas a large bank merger should be rejected. This is critical because any weaknesses identified in either or both of the merging institutions become even larger concerns once the merger is complete. That is, the increased size, complexity, and interconnectedness of the resulting institution increases the potential risks resulting from deficiencies along prudential factors. For larger institutions, this increased risk can result in financial stability concerns.

First, the combining of two banks into a larger one that would then not be adequately capitalized, or have insufficient liquidity, should never be allowed. Specifically, the capital and liquidity analysis of a large bank merger should include a stress-based measure of capital adequacy and liquidity sufficiency. Just as with an existing large bank, the resulting combined bank must be able to demonstrate it can likely withstand potentially severe stress and still be able to continue to operate without tax-payer support. If the merged entity cannot demonstrate that it could withstand stress consistent with the Federal Reserve’s annual stress test and maintain sufficient liquidity in times of stress, there should be no approval of a merger.

Second, demonstrated material weaknesses in key risk management and corporate governance practices or evidence of failures to comply with applicable laws or rules should form an important element of any merger consideration. Identified weaknesses would provide a strong indication that bank management and the banks’ board of directors are not effectively carrying out their responsibilities, and so any planned merger should be prohibited. If the problems are at a bank whose operations will be folded into a merging or acquiring institution, then at a minimum the application process should require a written agreement with a detailed accounting of weaknesses at the target bank and a plan that specifically lays out how and when the problems will be addressed by the acquiring bank. And the merged bank's operations should be contingent on the resolution of identified weaknesses. If the merger is approved and yet material problems linger, the merged entity should have all capital distributions to shareholders suspended until such time as it has addressed the issues detailed in the plan submitted as part of the application.

Should the problems be at the acquiring bank, any merger or acquisition should not be allowed until the specific issues have been fully addressed. It should not be the case that an institution with significant identified weaknesses be allowed to acquire another institution, since its issues likely will be continued as part of the larger, merged operation.

Response to Question 4: The Review Process Must Work to Enhance the Public Interest and the Servicing of the Convenience and Needs of Underserved Communities.

The assessment process should include provisions that work to improve the availability of products and services in underserved communities. As discussed above, bank mergers can reduce the availability and increase the cost of banking products and services, especially in low-income communities and economically marginalized communities of color. The true effects of this can cause long-term damage to communities only over time and so may not be apparent at the time of the merger. That is, whether there are immediate or gradual changes to a bank's business model after its merger, the damage may only be observed as businesses close, incomes reduce, and homeownership declines over time, in some cases over many years. Therefore, it is important to ensure that a minimum level of service is maintained after the merger for some time.

First, the agencies should perform a more up-to-date analysis of CRA review-related data at the time of the merger assessment. At the very least, this analysis should be performed on home lending data, which is reported regularly (annually and, for certain banks, quarterly) and can be analyzed easily without examination teams. Once the Consumer Financial Protection Bureau begins collecting data through its proposed rulemaking amending Regulation B to implement changes to the Equal Credit Opportunity Act made by section 1071 of the Dodd-Frank Act, this analysis could easily be performed for small businesses as well (although some form of analysis could be performed now with current data sources). Analysis at the time of the merger assessment is necessary not only to have a recent picture of the performance of the merging banks but also would allow the agencies to investigate some of the public comments received and provide analytical support for its conclusions.

The analysis should be performed over time a robust time period, perhaps for at least a decade prior to the merger application, and use annual data instead of data grouped over several years. Analysis over a more extended time range provides insight into the performance of each of the merging banks and their behavior and business strategy within low-to-moderate ("LMI") communities and to LMI individuals. Additionally, this insight can provide an indication of how the merged bank may perform in the future. And unlike the analysis performed in CRA examinations which pool multiple years of data, using annual data would more clearly show whether banks are consistent in their behavior year-over-year.

Second, the merger review process should include some thresholds related to both the CRA examination conclusions and any additional analysis performed that either prevent a merger from proceeding or that require certain actions and commitments. Some "unspoken" thresholds may currently exist that are discussed with the banks prior to the formal merger applications being submitted, but thresholds should be codified as part of the process so that the public has full transparency of the expectations of the agencies. A set of possible examples of remedial actions and commitments should also be published for the public's awareness, such as divesting branches or executing community benefit agreements ("CBAs"), but ultimately the actions or commitments required as part of the approval should be directly related to the identified issues.

Third, more must be done to ensure the convenience and needs of communities are served after merger completion. To this end, this letter fully supports and adopts the following recommendations of the National Community Reinvestment Coalition from their October 16, 2020 letter[18] to the DOJ in response to its 2020 request for comments on the 1995 Bank Merger Competitive Review Guidelines, either as quoted or with some modifications.

- Any area in which competition is shown to be materially reduced, whether across products or for individual significant products such as mortgages, should not only lead to heightened anti-trust reviews but also conditional merger approvals requiring concrete public benefits in the specific geographical areas (metro areas or rural counties). Currently, the agencies do, in some instances, give some mergers heightened reviews and occasionally order branch divestitures, but they rarely institute public benefits remedies.
- "When a merger results in an institution of a certain asset size of either $10 billion or $50 billion, a public benefit plan for the banks' entire geographical footprint must be a part of the merger application subject to public comment. NCRC's preferred threshold would be $10 billion since these are large banks…However, if the agencies wanted to focus on the very largest banks for this requirement, the threshold of $50 billion could be used."
- The agencies should designate counties as underserved, which could be defined as counties with low levels of retail lending per capita. The designation would result in elevated attention in convenience and needs and competition analyses for those counties and more readily lead to remedial actions or commitments.

Conclusion

After nearly forty years, the agencies need to take account of the ever-increasing consolidation of the banking industry, and they must enhance the merger review process to actually consider all factors listed in the applicable laws, exercising their discretion under the law to do so. The merger process should be rationalized to ensure that future mergers only enhance the public

[18] Available at https://www.justice.gov/atr/page/file/1330336/download

interest while reducing, or at least not increasing, the level of risk in the system by incorporating the recommendations laid out in this letter.

Sincerely,

[redacted]

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