



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

May 31, 2022

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

Dear Assistant Executive Secretary Sheesley:

I am writing on behalf of The Association for Neighborhood and Housing Development (ANHD) to comment on the Request for Information (RFI) issued by the Federal Deposit Insurance Corporation (FDIC) seeking information and comments regarding the application of the regulatory framework that applies to merger transactions involving one or more insured depository institution, including the merger between an insured depository institution and a non-insured institution.

ANHD is a member organization made up of over 80 community groups across New York City. Our mission is to build community power to win affordable housing and thriving, equitable neighborhoods for all New Yorkers. We also convene the Equitable Reinvestment Coalition which is dedicated to holding financial institutions accountable for the wealth and racial inequities they helped create and continue to perpetuate¹.

In this letter, we offer and elaborate on the following recommendations for regulators to incorporate into the bank merger review process. These pertain primarily to Question 1 on the efficacy of the bank merger act and Question 4 (CRA and “convenience and needs”). They also touch upon questions 7 and 8 which ask about a presumption of approval and where the burden of proof falls to demonstrate public benefit and compliance with the bank merger act requirements.

- Rigorously evaluate each banks’ CRA records
- Any mergers that are approved should only be done so with conditions (“conditional approval”) to address past harms and enforce forward-looking plans.
- Regulators must require a rigorous, community-driven, forward-looking, ambitious “convenience and needs” plan (“CRA plan” / Community Benefits Agreement) that has been informed and approved by local stakeholders. This includes procedures to limit and mitigate branch closures
 - Any approvals must be conditional upon meeting the goals in these plans, with regulatory monitoring and oversight.
 - Eliminate the streamlined application, and make any approvals granted “conditional approvals” so the plan can be monitored and enforced.
 - Publicly report on any denials (or intentions to deny if application withdrawn) related to inadequate “convenience and needs” and CRA records and require action plans to pass the next CRA exam and be allowed to merge in the future.

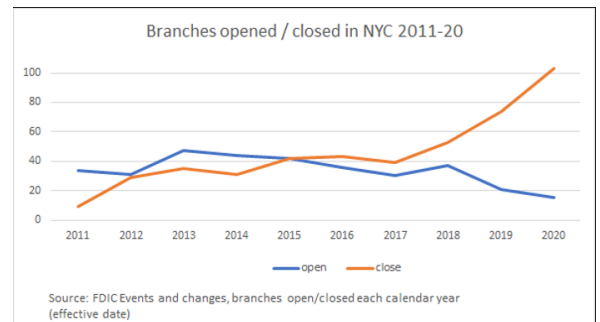
¹ <https://anhd.org/project/equitable-reinvestment-committee>

- Community Input must be central, with adequate time, access, and mechanisms to ensure meaningful input from Black, Indigenous, and other People of Color (BIPOC) and LMI residents, business owners, and communities
- Be consistent across agencies to avoid arbitrage and inconsistent outcomes, and consult on mergers spanning regulatory agencies.

As the FDIC itself documents in the RFI, *“The banking sector has experienced a significant amount of consolidation over the last 30 years... This period of consolidation, fueled in large part by mergers and acquisitions, has contributed to the significant growth of the number of large insured depository institutions, especially insured depository institutions with total assets of \$100 billion or more.”*

The Community Reinvestment Act (CRA) was originally passed as one of several landmark civil rights laws passed in the 1960s and 70s in response to systemic redlining, discrimination, and disinvestment. A bank’s CRA record is a critical piece of the merger review process, as is their requirement to meet community needs moving forward, which will presumably be reviewed in a future exam. This merger review process comes at an opportune moment when the CRA is also being updated². As the data shows, after forty years of the CRA, and hundreds of mergers approved, often with vague promises that these larger institutions, operating at larger scales, would have more capacity to better serve consumers, we have fewer banks, less competition, all while racial inequities persist.

- **Fewer bank branches:** NCRC found that banks have closed over 13,000 branches since 2009, with most of those closing in the past 5 years - 7,500 since 2017, and 4,000 since March 2020.³ They further noted that one-third of the branches closed from 2017 - 2021 were in a low- to moderate-income and/or a majority-minority neighborhood, and that closures in the prior decade resulted in 80 new rural banking deserts.



- In **New York City, branch closures have also been accelerating in recent years.** ANHD documented over 100 branch closures in 2020 alone; over 25% were in LMI tracts and 2% in already underbanked majority Black and/or Latinx neighborhoods⁴. Another 100 or so have closed since then. Even in years where the net change was low, the impact of even one or two closures in an underserved community has an outsized impact.
- Not only do branch closures impact the availability of service and credit, they can also reduce the scrutiny a bank is subject to under the CRA if they close their last branch in a county.
- **More extractive fees:** While we appreciate that banks are finally showing signs of moving away from overdrafts, it is only after collecting billions in such fees and disproportionately from lower-income and BIPOC people.
- **Banks pulling out of key areas of business.** Over the past decade or so, several banks have pulled out of lines of business that consumers need. Most notable is the number of banks that

²ANHD statement on the Notice of Proposed Rulemaking <https://anhd.org/press-release/anhd-statement-new-community-reinvestment-act-cra-proposal>

³ <https://ncrc.org/the-great-consolidation-of-banks-and-acceleration-of-branch-closures-across-america/>

⁴ <https://anhd.org/blog/how-branch-closures-impact-hard-hit-communities>

have stopped making 1-4 family loans entirely, including among banks that had affordable products with financial assistance⁵.

- **Racial disparities persist and the racial wealth divide widens:** The racial wealth gap has widened considerably over the past few decades, such that today the average Black and Latinx households earn about half as much as the average White household and have about 15 to 20% as much net wealth⁶. ANHD has documented persistent racial disparities in banking and lending, resulting in fewer residential and small business loans, fewer branches, more harassment and displacement, and fewer resources for BIPOC people and communities⁷.

Mergers and applications to open or acquire branches are the only times when the CRA can be enforced, and offers mechanisms for communities to engage and potentially influence the process. ANHD is an active member of the National Community Reinvestment Coalition (NCRC), which has documented \$548 billion in commitments and other benefits through Community Benefits Agreements (CBA) processes since 2016⁸. ANHD has also led and engaged in similar processes over the years, which have led to meaningful commitments.

However, these plans are not required, and many banks can choose not to engage, or put forth plans that fall far below what is needed to address local concerns. Because detailed plans and community engagement are not required, the burden falls on the most impacted communities to have the time, knowledge, capacity, and power to know a merger is happening and then initiate a process and negotiate with a bank that has far more money and resources. This is especially difficult as communities struggle post-pandemic, and as the pace of mergers accelerates.

In early April 2022, ANHD analyzed merger filings on the FDIC and OCC's websites and found that in just the past four years (2018 to 2021), 736 merger applications (FDIC: "regular merger" and OCC "Business combinations" were submitted. Of those, 679 (92%) were approved and just 23 (3.1%) withdrawn. None were denied. The trends were the same with the 314 FDIC reorganization applications (merging two bank affiliates). While some of these resulted in a CBA or CRA plan, most likely did not. At least 47 applications submitted in 2021 and 2022 appear to be pending across both agencies, most of which will likely be approved if the current system remains, even as the trends outlined above make it clear that the current system is not working to ensure local needs are met.

We offer the following observations and recommendations that speak to several questions posed within the RFI, primarily within the broad Question 1 on the efficacy of the bank merger act and Question 4 (CRA and "convenience and needs"). They also touch upon questions 7 and 8 that ask about a presumption of approval and where the burden of proof falls to demonstrate public benefit.

Regulators must rigorously evaluate each banks' CRA record, which should factor into a conditional approval and CRA plans

A bank's CRA record is one important factor to consider when evaluating how well the banks on both sides of the transaction have served their communities. However, in reviewing each bank's record, regulators must go beyond the final grade and evaluate how the banks performed within each

⁵ For example: Capital One, NYCB, Santander, Sterling, and BankUnited stopped making 1-4 family loans in recent years..

⁶ <https://www.federalreserve.gov/econres/notes/feds-notes/wealth-inequality-and-the-racial-wealth-gap-20211022.htm>

⁷ <https://www.congress.gov/116/meeting/house/110580/witnesses/HHRG-116-BA15-Wstate-WeisbergJ-20200306.pdf>

⁸ <https://ncrc.org/explainer-how-ncrc-brings-banks-and-local-leaders-together-for-community-benefits-agreements/>

assessment area, paying close attention to areas described as “poor” and ratings of “low satisfactory”, as well as harms that did not result in a downgrade. Current CRA rules limit the range of activities that can lead to a downgrade, but should, such as in cases of branch closures in underbanked BIPOC and LMI areas, and financing that leads to poor housing and tenant displacement. Regulators should also take note of responsive products and practices for the resulting bank to continue or adopt, to reduce the incidences of banks expanding and then subsequently reducing services like residential or small business loans, or charging higher fees.

If a bank does not have branches or an assessment area in the market it is entering, regulators should also evaluate any activity there. This is especially important for banks that engage in online banking and offer loans via brokers or correspondent lenders. Likewise, many CRA exams are outdated and as such, require regulators to evaluate CRA activity since the last exam. On some exams, we have seen banks put forth positive activities in that timeframe, but less analysis by regulators of lending disparities or other evidence of harm and displacement.

Any mergers that are approved should only be done so with conditions (“conditional approval”) to address past harms and enforce forward-looking plans.

Branch closures, lending disparities, predatory lending, financing bad-acting landlords, and extractive practices by either bank, identified through the exam or community comments must be factored into the application, either resulting in a denial or factored into the CRA plan in the conditional approval to mediate past harm and prevent similar behavior moving forward. Further, **regulators must make such findings public, both in the case the application is denied or if an application is withdrawn before a determination is made, and hold banks accountable.** In such cases, the bank must still remediate and correct harmful or subpar behavior in order to pass the next CRA exam and be able to expand in the future.

Regulators set good precedents with conditional approvals for poor performance when Valley National acquired 1st United (OCC - 2014)⁹, Sterling National acquired Hudson Valley (OCC - 2015)¹⁰, and Investors acquired Berkshire bank branches (FDIC)¹¹. The first two required CRA plans that led to new products, investments, and meaningful community engagement. The third specified the bank must improve its lending and marketing to better reach “minority borrowers”, after finding low levels of their lending to Black and Hispanic borrowers.

In all cases, any approvals granted must be conditional approvals to monitor and enforce CRA plans.

Regulators must require a rigorous, community-driven, forward-looking, ambitious “convenience and needs” plan (“CRA plan” / CBA) that has been informed and approved by local stakeholders. Any approvals must be conditional upon meeting the goals in these plans, with regulatory monitoring and oversight.

- **Eliminate the streamlined application, and make any approvals “conditional approvals” so the plan can be monitored and enforced.**
- **Publicly report on any denials (or intentions to deny if application withdrawn) related to inadequate “convenience and needs” or CRA records, and require action plans in order to pass the next CRA exam and be allowed to merge in the future.**

⁹ <https://www.occ.treas.gov/topics/charters-and-licensing/interpretations-and-actions/2014/crad163.pdf>

¹⁰ <https://www.occ.gov/topics/charters-and-licensing/interpretations-and-actions/2015/crad167.pdf>

¹¹ <https://s3.documentcloud.org/documents/21030696/investorsbankfdicconditions2icp.pdf>

Such a plan could take many different forms, including a CBA plan signed by local groups or another type of CRA plan. If a set of organizations representative of the communities most impacted are engaged in a CBA process, the regulators should monitor that process and delay approval until it is completed to the satisfaction of all parties.

Absent such a process, or in geographies the CBA doesn't cover, regulators must establish a framework for a set of goals that significantly improve upon the combined record of the two banks and address any prior harm or disparities. These include goals to benefit LMI and BIPOC people, small business owners, and communities. Goals include, but are not limited to, consumer, residential, and small business lending, new branches and access to banking, products and practices, community development lending, investments and grants, and anti-displacement policies, staffing, and structures to meaningfully implement the plan. All must be informed by local input and represent a significant increase over current levels.

There must also be structures to mitigate branch closures: Commitments to not close any branches in LMI or BIPOC communities. For underperforming or underutilized branches, banks must establish a community-driven process to review products and practices and identify steps to improve performance and ensure local banking needs are met moving forward.

ANHD recently participated in two CBA processes that resulted in meaningful commitments for New York City. First when M&T acquired People's United Bank¹², and then when NYCB applied to acquire Flagstar Bank (more on the latter further down)¹³. As a result, New York City will see new branches, new lending and banking products, community development investments, increased staffing, and enhanced multifamily lending practices to prevent displacement. As mentioned above, we saw similar benefits with Valley and Sterling, as well as Santander which entered into a CBA process outside of a merger. But, we must note that even these plans did not prevent branch closures or losses of certain business lines.

Too often, mergers are approved without any plan put forward, or without the support of stakeholders impacted. This happened with Citizens Bank, twice. The OCC approved Citizens' streamlined application to acquire over 80 HSBC branches, despite formal opposition asking for a plan and documenting significant concerns with both banks, ultimately allowing them access to a completely new state and assessment area (and customer base from the acquired branches) without any concrete CRA plans. Soon after, the bank acquired Investors Bank, further expanding their presence in New York, New Jersey, and surrounding areas. In this case, they actually entered into a CBA process with NCRC (including members like us at ANHD), but failed to complete the process. Both approvals were granted despite formal protests documenting significant lending disparities, high fees, and concerns with the process.

Community Input must be central with adequate time, access, and mechanisms to ensure meaningful input from BIPOC and LMI residents, business owners, and communities

Community input must be solicited and taken into account in both the CRA record and forward-looking plan reviews. Banks already go through a lengthy process to satisfy their shareholders and board members. Yet, local communities have limited time and ability to weigh in after that. The people most qualified to inform the impact of competition, review of a banks' record, and activities needed are the

¹² <https://ncrc.org/ncrc-and-mt-bank-announce-43-billion-community-growth-plan-to-support-underserved-and-communities-of-color-small-businesses/>

¹³ <https://anhd.org/blog/new-york-community-bank-merger-leads-promising-commitments>

people already underserved by our inequitable, unjust financial system: BIPOC, immigrants, and LMI residents, business owners, and communities, including people with other barriers to inclusion, such as seniors; people with limited English language and disabilities; and formerly incarcerated. Priority must be given to these communities and organizations led by and serving similar populations, such as CDCs, CDFIs, community and tenant organizing groups, housing counselors, and service providers.

Meaningful input requires information in a timely manner, accessible to the broad community, and with adequate time to review:

- Do not require any stakeholder to go through a FOIA process to access bank merger applications. There should be a central location for all bank applications and ensure that comments to one agency go to all applicable agencies. The OCC's FOIA reading room is a model to expand upon.
- Advance notice of a merger and a range of ways to provide input: public hearings, local listening sessions, 1-1 meetings, and written comments. Daytime and evening meetings; in-person and virtual, language access.
- Accessible data for both entities in the transaction at a local level, with an option to request further information.

Regulators should also consider forming community advisory boards in local markets to solicit and review community input, and vote on applications.

Finally, regulators must be consistent across agencies to avoid arbitrage and inconsistent outcomes, and should consult with one another on mergers spanning regulatory agencies.

- For states with a local CRA, such as New York, all federal agencies should consult with state regulators on any merger application involving a state-chartered bank, a bank with a presence in that state, and/or a bank that will have a presence post-merger.
- When a bank under one regulator is acquiring a bank under another, both regulators should have the power to approve/deny/place conditions on the application. If one regulator denies an application or fails to make a determination, the bank should not be allowed to seek approval under another regulator.

For example, Citizens Bank's two transactions referenced above bring the bank into New York State, which has a state regulator (DFS), and involved an acquisition of an FDIC-regulated bank, yet neither agency had a formal role in the merger process. Another example is that of NYCB right now. As noted above, ANHD appreciates the process the bank entered into with us and NCRC to craft a CBA in relation to their application to acquire Michigan-based Flagstar Bank, a plan which incorporates many meaningful CRA activities that NYCB can and should do under its current business model, as well as new lines of business from Flagstar. However, when the FDIC failed to make a determination, rather than address any outstanding concerns with them, the bank withdrew its application and is applying through the OCC, in what appears to be regulatory arbitrage. Worse, they are doing so through the rushed and less rigorous streamlined application process. This move will result in the bank falling under a new regulatory agency and receiving less oversight overall as the bank will come out of New York State supervision. This should not be allowed.

Conclusion

We appreciate the opportunity to provide and discuss our recommendations for regulators to incorporate into the bank merger review process. As the letter outlines, we are asking for more rigorous

analyses of bank CRA records; transparency and remediation when applications are denied or withdrawn due to inadequate CRA records or plans; approvals conditional upon the creation and implementation of strong and ambitious community-driven, forward-looking plans that increase access to responsible banking and minimize branch closures; improved mechanisms for community input; and consistency across agencies.

We look forward to the next steps in the process, both for CRA reform and a more rigorous bank merger review process, which we hope extends across all three agencies. If you have any questions, or need further information, please contact me (Barika.W@anhd.org) or Jaime Weisberg, ANHD's Senior Campaign Analyst for Responsible Banking (Jaime.W@anhd.org, 718-637-3054).

Sincerely,

Barika Williams
Executive Director
Association for Neighborhood and Housing Development (ANHD)