IBC
INTERNATIONAL BANCSHARES CORPORATION

May 31, 2022

Via email: Comments@fdic.gov

Federal Deposit Insurance Corporation
Mr. James P. Sheesley, Assistant Executive Secretary
Attn: Comments – RIN 3064-ZA31
550 17th Street N.W.
Washington, D.C. 20429

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

Dear Sir:

The following comments are submitted by International Bancshares Corporation ("IBC"), a publicly-traded, multi-bank financial holding company headquartered in Laredo, Texas. IBC maintains 167 facilities and 261 ATMs, serving 75 communities in Texas and Oklahoma through five separately chartered banks ("IBC Banks") ranging in size from approximately $480 million to $9.3 billion, with consolidated assets totaling over $16 billion. IBC is one of the largest independent commercial bank holding companies headquartered in Texas.

This letter responds to the request for comment ("Request") by the Federal Deposit Insurance Corporation ("FDIC") related to the FDIC's practices, rules, regulations, guidance, and statements of policy that apply to merger transactions involving at least one insured depository institutions. There is no doubt that the competitive landscape of the banking industry has changed substantially since the FDIC's bank merger guidance and policy was enacted in the 1990s, and since the FDIC and other federal financial regulators implemented their applicable bank merger regulations. IBC believes that it is appropriate for the FDIC to update its approach to reviewing bank mergers. The Request lists ten specific requests for comment. IBC has provided general comments and comments to the specific requests as noted below.

General Comments

The FDIC asserts that "more than three decades of consolidation and growth in the banking industry have significantly reduced the number of smaller banking organizations and increased the number of large and systemically-important banking organizations." [Request at 18740] The FDIC goes on to provide voluminous data showing the effect of increased mergers and acquisitions among depository institutions, including the clear industry consolidation, the increase in large depository institutions with more than $100 billion in assets, and the decline in small and mid-sized depository institutions. [Request at 18740-1] Perhaps the most stark data point is the fact that there were no institutions with more than $250 billion in assets and there was only one institution with more than

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$100 billion in assets in 1990, but there are currently 33 institutions with more than $100 billion, with 13 of those institutions having more than $250 billion in assets. Concerningly, "while insured depository institutions with total assets of more than $100 billion comprise less than one percent of the total number of insured depository institutions, they hold about 70 percent of total industry assets and 66 percent of domestic deposits;" at the same time, between 1990 and today, the number of small and mid-sized institutions with less than $10 billion has decreased 68%. [Request at 18741]

This is not the picture of a healthy, competitive financial industry. This is not the result of natural evolution, growth, and adaptation to changing financial trends, needs, and demands. Instead, this is the clear result of over-reaching regulatory burdens that have effectively made it impossible to operate small and mid-sized banks in a safe, sound, and profitable manner. Indeed, IBC believes quite strongly that over-reaching governmental policies, regulations, rules, guidance, oversight, supervision, and enforcement has been a primary driver of the decrease in small and mid-sized institutions.

Instead of addressing a symptom of the issue (namely, increased mergers that, in the FDIC's opinion, decrease competition), the FDIC and other federal banking regulators should focus on the underlying causes of the uptick in depository institution mergers: increased regulation and oversight, and its related compliance burdens and costs. The regulatory burden on smaller institutions has increased significantly during the period of industry consolidation (due in large part to Dodd Frank, the PATRIOT Act, and the beneficial ownership rule, to name only a few). This has required smaller institutions to spend significantly more of their resources on compliance, giving their larger competitors greater advantages due to economy of scale. The FDIC should use its rulemaking authority to create more exceptions for well-run small and mid-sized banks that have a proven track record, via the regulatory examination process, of operating in a safe and sound manner. During this recent period of industry consolidation, competition from tax-advantaged competitors (such as credit unions) and non-traditional financial entities (e.g. fintechs) has overwhelmingly increased.

The FDIC notes that "[t]he Dodd-Frank Act made a number of statutory changes aimed at addressing the risks posed by the largest banks, including an amendment to the Bank Merger Act requiring consideration of the risk posed to the stability of the United States banking or financial system of a proposed bank merger." [Request at 18741] Unfortunately, the FDIC appears not to recognize its own part in the creation of the current financial landscape. Even though it is tasked with considering the stability of this country's banking and financial system when evaluating and ruling on a merger request, the FDIC overwhelmingly applies the narrowest aperture to its review and fails to consider the wider and net implications of merger requests. Mergers, and the current fraught relationship between small and mid-sized institutions and massive banking conglomerates, should be viewed through a broader lens in order to avoid not only short-term de-stabilizing events, but also long-term effects for which each merger may be a cause of erosion that, when compiled, has caused, and will continue to cause, even greater de-stabilization.

The FDIC is correct that "a reconsideration by the FDIC of the framework for assessing the financial stability prong of the [Bank Merger Act] and focused attention on the financial stability risks that could arise from a merger involving a large bank is warranted." [Request at 18741] However, IBC strongly urges the FDIC to exercise caution during its re-evaluation and to acknowledge and consider the potential long-term and cumulative effects of merger requests. It should also consider the underlying causes of mergers and their effects, and the FDIC's own role in and contribution to such effects and their underlying causes, primarily the increased regulatory burdens and costs which are the basis for an overwhelming amount of mergers. This is to say nothing of the recent regulatory interest and action related to fees charged by banks for financial services. Specifically, the CFPB has made its agenda clear, and it includes drastic changes to and restrictions on fees that banks can charge their customers for financial services. In fact, the CFPB has chosen to label all such fees "junk fees," which is wholly inaccurate and undermines the importance of these use and transaction-based fees that are fundamental to the survival of community banks. Small and mid-sized banks rely on such fees as a primary source of non-interest income, and these fees help make up for the losses those banks suffer from offering basic banking products and services to consumers. The CFPB has stated that many small and mid-sized banks disproportionally rely on "junk fees," but, as IBC has consistently noted, basic consumer financial products and services (e.g. free checking accounts) generally result in a monetary loss to the banks that provide them. To make up for that loss, banks charge fees for optional services offered to customers and available at the customer's choice, such as overdraft protection and dormant accounts, in order to pay for the costs of those services and to help recoup losses from the banks' free products and services. Without this non-interest income, small and mid-sized banks will continue to face the choice of merging with another institution or simply terminating operation. Clearly, a merger is the best choice for the banks' communities, so that consumers do not lose access to local banking options. If the FDIC is truly concerned about "increased" merger activity, it should address a primary root cause of such activity: the inability for small and mid-sized banks to stay solvent and profitable in an environment where regulatory costs and oversight, as well as the continued restrictions on banks' ability to charge appropriate fees, are constantly threatening the banks' ability to remain independent and find alternative profit pipelines.

Small and mid-sized banks are simply unable to meet their regulatory and compliance obligations in a safe, sound, and profitable manner in many circumstances, and this is painfully true when considering certain asset thresholds that trigger additional regulatory obligations and oversight. For example, many institutions must seek out a merger partner once they start to get close to an asset threshold trigger because the institution alone cannot shoulder the additional regulatory costs and thus must overshoot the asset threshold entirely and merge with an already large institution that has sufficient experience and resources. Much like Silicon Valley start-ups and fintechs generally, small and mid-sized institutions no longer dream of organic growth with a goal of continued, sustained asset increases. Instead, these institutions have to accept the hard reality that the only attainable goal is growth sufficient to reach an asset threshold trigger in order to eventually merge with a (typically much) larger institution. More and more, small and mid-sized institutions realize that they simply cannot make the regulatory jump required at

certain asset thresholds, and must instead focus on courting potential buyers once they start to reach that threshold.

IBC supports the enactment of a de minimis exception for mergers involving institutions under a certain asset threshold. Under such exception, the FDIC could greatly cut down on the documentation and approvals required to finalize a bank merger. For example, the FDIC could rely on a general competitive factor report for the relevant geographic footprint from the DOJ, but would not otherwise conduct an independent competitive effects analysis of the specific proposed merger if the combining or resultant institutions are under a certain asset threshold. The applicable federal bank regulator would still be required to consider the DOJ report to ensure that the merger would not substantially lessen competition. *See* 12 U.S.C. 1828 and 1842. In this way, anticompetitive deals would still be prohibited. But the exception would ensure that certain small mergers could be consummated in a timely way, without protracted and costly investigations by the FDIC or DOJ. An appropriate threshold for this exception may be if any merging or resulting institution has $50 billion or less in assets. Furthermore, the current inflationary environment would suggest that any threshold established should likely be indexed, and revised each year similar to antitrust review thresholds.

Specific Requests for Information

Question 1. Does the existing regulatory framework properly consider all aspects of the Bank Merger Act as currently codified in Section 18(c) of the Federal Deposit Insurance Act?

> **IBC Comment:** Section 18(c) states that the responsible federal regulator shall not approve—
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> > (A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or
> >
> > (B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.
> >
> > In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, the convenience and needs of the community to be served, and the risk to the stability of the United States banking or financial system.

It is IBC's fundamental position that it is not the statutory or regulatory considerations and aspects of the bank merger review rules, regulations, and guidance that require review and updating in order to align with the modern financial industry. Rather, it is the scope and nuance of those load-bearing beams of the merger framework that require review and revision. For example, applying traditional concepts of competition and competitive effects to the modern realities of banking is leading to the actual state of competition in this industry being greatly overlooked. The federal financial regulators and the DOJ frequently ignore or downplay the effects and size of fintechs and the ubiquity of financial technology in general when analyzing mergers for competitive concerns. Regulators are quick to decry consolidation and decreased competition in the U.S. financial marketplace for banking services because they pointedly ignore the technological advancements that have increased the ease with which traditional chartered banks, financial institutions without a banking charter or license, and bank competitors without a local branch, can and do compete for customers in local communities across America. This is especially egregious in cases where non-banks, such as Walmart or HEB, partner with proxy banks (with no branching authority) to offer debit cards which function fundamentally as deposit accounts. It is important to note that not only do these new financial market participants have sheer numbers on their side, greatly outpacing the number of insured banks, but these fintechs and other players are *large* and, in most cases, they can add financial products and services to their retail offerings with little or no added cost, making them an existential threat to most small and mid-sized community banks. They are not restricted from engaging in other business and investments, like most banks are. These fintechs have vast reaches and offerings, and regulators should consider this reality when analyzing a proposed bank merger. Instead, regulators analyze the competitive landscape using outdated methodology that fails to consider the practical reality of financial products and services for any given population.

While the merger of two small banks may technically decrease competition, it is important to view that merger in the context of the larger financial market, in which fintechs may be offering competing accounts, loans, and other financial services without even having a physical presence in the geographic footprint at issue. It also may be overlooked that the only alternative for those two small institutions to stay solvent would be to merge with a large, nationwide institution. Thus competition would still ultimately be reduced under traditional calculations, but certainly two small institutions merging into a medium-sized community bank is preferable to losing both banks to failure or a large, nationwide bank moving into the community to which it may have little or no previous connection and will likely have limited local engagement.

It is also important to note that there are many factors that drive mergers of small and mid-size community banks, including the need for scale, diversification of risk through geographic or product expansion, and generational change in ownership. Mergers between two community banks are frequently net-positive transactions,

resulting in greater lending capacity, greater innovation and tech investments, a wider range of products and services, stronger cybersecurity, and additional community investments, as a result of lower operating costs from the presence of scale economies. It is axiomatic that one healthy bank is better than two failing ones. Any change in merger policy making bank mergers more difficult risks disproportionately impacting these small and mid-sized banks and their communities. The FDIC, along with all the federal banking regulators, should ensure that each component of Section 18(c)'s merger review statutory prongs are appropriately updated to fully capture the realities of the current financial market and competitive landscape that banks actually face.

Question 2. What, if any, additional requirements or criteria should be included in the existing regulatory framework to address the financial stability risk factor included by the Dodd-Frank Act? Are there specific quantitative or qualitative measures that should be used to address financial stability risk that may arise from bank mergers? If so, are there specific quantitative measures that would also ensure greater clarity and administrability? Should the FDIC presume that any merger transaction that results in a financial institution that exceeds a predetermined asset size threshold, for example $100 billion in total consolidated assets, poses a systemic risk concern?

IBC Comment: IBC strongly disagrees that, to the extent the FDIC believes it must set a merger asset threshold above which a merger transaction and its resulting institution would be considered to pose a systemic risk, such asset threshold should be set as low as $100 billion. If the FDIC is going to set a "systemic risk threshold," IBC believes $250 billion is the appropriate asset threshold, again indexed for annual review and increase. IBC notes, however, that in a $20 trillion economy, what is truly a "systemic risk" is relative and any threshold should be tailored as such.

IBC also believes the FDIC should consider a converse threshold and implement a rule that merger transactions in which the merging or resulting institutions have less than $50 billion (indexed for annual increase) in assets are presumed to not pose a systemic risk concern and do not require such a review and analysis per se. This would also acknowledge that financial stability at a less-than-macro level can frequently be bolstered by the merging of two small or mid-sized institutions. Far from implicating a national or global systemic risk, community banks should have more flexibility to merge in order to stay viable and provide local banking services to their communities, which arguably supports a decreased financial stability risk.

Question 3. To what extent should prudential factors (for example, capital levels, management quality, earnings, etc.) be considered in acting on a merger application? Should bright line minimum standards for prudential factors be established? If so, what minimum standard(s) should be established and for which prudential factor(s)?

IBC Comment: Such prudential factors should not necessarily be a bar to merger, but they can be used to "fast track" merger applications. For example, entities that meet certain prudential thresholds should be given a presumption of approval that can only be overturned based on other factors (e.g. competitive effects analysis). This presumption can also be limited to small and mid-sized institutions, such as mergers of institutions with less than $100 billion in assets (indexed for annual increase). The prudential thresholds may include a requirement that institutions be well-capitalized (potentially with an additional buffer required) and that the institutions received satisfactory regulatory exams. All of these prudential factors should be used to help make merger reviews more efficient and to provide more stability and certainty to banks considering merger transactions.

Question 4. To what extent should the convenience and needs factor be considered in acting on a merger application? Is the convenience and needs factor appropriately defined in the existing framework? Is the reliance on an insured depository institution's successful Community Reinvestment Act performance evaluation record sufficient? Are the convenience and needs of all stakeholders appropriately addressed in the existing regulatory framework? To what extent and how should the convenience and needs factor take into consideration the impact that branch closings and consolidations may have on affected communities? To what extent should the FDIC differentiate its consideration of the convenience and needs factor when considering merger transactions involving a large insured depository institution and merger transactions involving a small insured depository institution? To what extent should the CFPB be consulted by the FDIC when considering the convenience and needs factor and should that consultation be formalized?

IBC Comment: IBC believes that the FDIC should revise its bank merger guidelines to prioritize approving mergers in rural and other small markets in order to preserve the financial viability of small and mid-sized community banks so that these (typically underserved) areas can continue to have a robust physical banking presence. Non-traditional and alternative financial institutions can offer increased access to banking services in these areas, but this typically comes with a loss of physical presence which can be incredibly detrimental to banking customers. Increased compliance costs and burdens, decreased consumer lending due to increased regulatory meddling, and the loss of and restrictions on so-called "junk fees" (i.e. non-interest revenue streams) have forced many small and mid-sized banks to realize economies of scale through merger to remain economically viable and competitive. These mergers, while they may quantitatively appear anticompetitive, often result in stronger financial institutions that are better able to meet compliance burdens and shoulder the related substantial costs associated with them, deploy technology, serve local households and small business with upgraded products and services, and compete with non-local, internet-based institutions that do not have a physical presence in rural and/or underserved areas. These mergers also generally result in financial institutions that are more committed to serving and improving the communities in which they are based. Small and mid-sized banks in rural and underserved markets may struggle to gain

regulatory approval for mergers, and the process of seeking merger approval can drag on for over a year and be very costly. IBC notes that the time between application and the approval or denial of a merger application over the last five years appears to have greatly increased, resulting in many institutions facing an interminable period of uncertainty. This increase in merger application review time is perplexing, as it exists across the full gamut of merger applications, even those where heightened regulatory scrutiny and review of the proposed merger is not warranted. Such uncertainty can be costly, as the institutions have to carry on as though the merger will be approved in order to accomplish all of the regulatory requirements in a timely fashion once a decision has been made on the application. This waiting period can be fatal to an institution, as the difficulty in retaining staff during this time can ultimately lead to the failure of an institution regardless of the eventual decision on the merger. By contrast, large banks are often more easily able to satisfy the quantitative anticompetitive analysis by divesting branches in certain concentrated markets. In addition, long and time consuming approval processes negatively impact the institutions involved because the lasting uncertainty fuels personnel losses and customer defections. Saving rural banks may not be possible if there are any more restrictions or hurdles to mergers, because maintaining a competent staff during pending mergers is more and more difficult if the only alternative to a merger is a stagnant institution with no future growth potential or even the ability to continue as a going concern.

A merger between smaller, rural-based institutions can be more easily declined by a regulator or the DOJ even though it would result in a stronger local bank that is better able to serve its community and improve its service offerings. In the case of a merger of large, urban-based institutions, the surviving institution may simply divest a few branches in order to receive an anti-competitive regulatory blessing, but the overall banking system becomes more concentrated and more systemically risky. It is also notable that mergers frequently result in branch closings, which can undermine the health and financial access of the community and local economy. The merger of two small or mid-sized banks in two separate geographic footprints would almost certainly result in less branch closings, and thus less community and economic harm, than a merger which includes a large and/or nationwide bank. The FDIC should acknowledge the stark differences by being more flexible in its consideration of small and mid-sized bank merger applications.

Question 5. In addition to the HHI, are there other quantitative measures that the federal banking agencies should consider when reviewing a merger application? If so, please describe the measures and how such measures should be considered in conjunction with the HHI. To what extent should such quantitative measures be differentiated when considering mergers involving a large insured depository institution and mergers involving only small insured depository institutions?

IBC Comment: In order to conduct a merger application review, including a competitive effects analysis, that is in line with the current financial services industry and markets, the FDIC should consider additional data points and

sources. This will provide a more holistic review of and insight into the relevant market. In many cases, and especially under the current competitive analysis guidelines, traditional data will not tell the entire story of a given financial market. No bank or service may be the most important element of a given geographic financial market, even if it is not competitive.

As noted below, one potential source is the Office of the Comptroller of the Currency's ("OCC") recent Community Reinvestment Act Rule ("CRA Rule"), under which OCC-supervised banks (including online-exclusive banks) will be required to track and report the location of their retail depositors. Another source of data to consider is that reported pursuant to the Home Mortgage Disclosure Act ("HMDA"), which would include reporting from non-depository mortgage lenders. This data could provide new insight into the competition traditional banks face from online banks. IBC believes this and other available data would likely highlight the fact that customers often travel farther within rural and underserved markets to obtain financial products and services than the current geographic market definitions (relied on by the federal bank regulators) assume, as well as obtain products and services through online channels or otherwise not through physical locations. IBC believes this data would provide clear insight into the actual, realistic degree of concentration in a market and thus the competitive landscape that would exist following a proposed merger. The FDIC should broaden its competitive analysis review to account for such physical and online products, services, and institutions. In today's markets, the only way many small and mid-size community banks can avoid failure and survive in order to ensure a reasonable profit to their stockholders, is to merge. In such circumstances, competition doesn't matter. Either the bank fails and the total number of banks with a physical presence decreases by one, or the bank is allowed to merge, either with a local or non-local institution, and the total number of banks with a physical presence decreases by one or stays the same, respectively. Declining a merger application does not guarantee the competitive landscape of a given geographic footprint will remain the same. Competition may decrease if the bank will fail without an appropriate merger partner.

Question 6. How and to what extent should the following factors be considered in determining whether a particular merger transaction creates a monopoly or is otherwise anticompetitive? Please address the following factors:

(a) The merging parties do not significantly compete with one another;
(b) Rapid economic change has resulted in an outdated geographic market definition and an alternate market is more appropriate;
(c) Market shares are not an adequate indicator of the extent of competition in the market;
(d) A thrift institution is actively engaged in providing services to commercial customers, particularly loans for business startup or working capital purposes and cash management services;
(e) A credit union has such membership restrictions, or lack of restrictions, and offers such services to commercial customers that it should be considered to be in the market;

(f) There is actual competition by out-of-market institutions for commercial customers, particularly competition for loans for business startup or working capital purposes; and
(g) There is actual competition by non-bank institutions for commercial customers, particularly competition for loans for business startup or working capital purposes.
With respect to the preceding factors, how and to what extent should the activity of current branches or pending branch applications be considered?

IBC Comment: IBC believes the FDIC should consider the vastly increased proliferation and availability of non-traditional and online-only banking options in its consideration of the competitive effects of bank mergers. Just the availability of a single bank does not mean that no one else will or is serving the area, or that the area is subject to a monopoly or low competition. Even where there is only one bank in the applicable geographic footprint, that bank will not serve 100% of the population because of the proliferation of online and other remote financial services options. When evaluating competition in rural or underserved markets, IBC urges the FDIC to acknowledge the structural differences between such markets and urban markets, including by considering competition from outside the confines of narrow geographic limits. Generally, the FDIC's competitive analysis and bank merger review relies on consideration of geographic markets as defined by the Federal Reserve Board or by county. Practically, this nearly always results in a finding that a proposed merger will reduce competition by some factor in the geographic market. These market definitions frequently fail to take into account how customers in those markets actually seek, obtain, and use banking services. In rural areas with relatively few banks, the most significant competition for loans, including credit cards for individuals and businesses, and deposits may be from financial institutions that are located or available only online, in neighboring counties, or in larger urban areas within a reasonable driving distance. IBC believes that in those instances, it would be appropriate for the FDIC to consider areas larger than one county as the applicable geographic market.

To reflect this new reality and address the increase in online-only financial institutions, the geographic markets for banking products and services should no longer be just based on local institutions and physical presence competition. Instead, the bank regulators should account for the presence of fintechs and other exclusively online institutions by examining the level of competition in these markets on a national level. Online institutions with no or limited physical presence are already generally doing business on a national level and are accessible to anyone with internet access. These institutions are currently competing with banks in both urban and rural markets, despite lacking a physical presence in their geographic market. This is also true of non-insured bank entities that are now leveraging their relationships with large retailers and consumers in order to offer extensive menus of consumer financial services, like Walmart and HEB offering debit cards and deposit accounts and credit card companies offering traditional loan products. Competition from these non-traditional entrants into the financial services market should be considered in any competitive analysis of a merger application.

While it is admittedly more difficult to obtain relevant information from and about such institutions in order to assess their presence for purposes of a competitive effects analysis, one potential source is data obtained under the OCC's CRA Rule, under which OCC-supervised banks (including online-exclusive banks) will be required to track and report the location of their retail depositors. This data could provide new insight into the competition traditional banks face from online banks. The FDIC should broaden its competitive analysis review to account for such physical and online products, services, and institutions.

Unlike most other businesses, entry into the banking space is not straightforward. In order to engage in the business of banking, generally one must first receive a charter and deposit insurance, both of which require comprehensive regulatory review and approval. This high burden to entry is a natural limit on competition, and is soundly based on the need to ensure that depository institutions are operated in a safe and sound manner. This is in stark contrast with other markets and business sectors where the anti-competitiveness of a merger is typically the sole basis of antitrust review. In banking, it is both prudentially appropriate and legally mandatory to consider the public interest more broadly and not myopically mere competitiveness.

Currently under the Bank Merger Act, bank regulators may not approve a merger if its effect would be "substantially to lessen competition, or to tend to create a monopoly" *unless* they find that "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." More than a mere weighing of competitive effects, bank regulators conduct a more holistic review of the proposed merger, and consider the unique facts surrounding the transaction, including the public needs of the specific geographic area at issue. If required for the specific merger transaction, the review of competitive factors includes a report on the competitive factors of the merger furnished by the DOJ. The bank regulators must also consider "the financial and managerial resources and future prospects of the existing and proposed institutions, the convenience and needs of the community to be served, and the risk to the stability of the United States banking or financial system."

Question 7. Does the existing regulatory framework create an implicit presumption of approval? If so, what actions should the FDIC take to address this implicit presumption?

IBC Comment: IBC does not think any "implicit presumption of approval" is a problem to be addressed. If a transaction advances to the application stage, it has done so because the stakeholders worked to make it acceptable to the regulator in order to guarantee (as much as can be done) regulatory approval. To the extent the FDIC believes parties presume approval, that is likely due to self-selection on the part of the merger participants. No parties *want* to make a merger application that will be denied. The application is a burdensome process, and incredibly costly.

Only the applications with the best chance of obtaining approval are submitted, thus most are approved and there may be an implicit presumption of approval. But that presumption is simply the result of parties being as careful as possible to only apply for the mergers most likely to be approved. If the FDIC considered every possible merger transaction from its earliest stages, it would certainly find that the majority ultimately do not result in an application for approval. Similar to the golden rule of litigation that you do not ask a witness a question you do not know the answer to, banks typically do not submit merger applications unless they are relatively confident that such applications will be approved. This is not a problem to be resolved, it is a feature (and not a bug) of the regulatory framework. The weeding out of problematic mergers is handled in the earlier stages, and not at regulatory application.

Question 8. Does the existing regulatory framework require an appropriate burden of proof from the merger applicant that the criteria of the Bank Merger Act have been met? If not, what modifications to the framework would be appropriate with respect to the burden of proof?

IBC Comment:

Question 9. The Bank Merger Act provides an exception to its requirements if the responsible agency finds that it must act immediately in order to prevent the probable failure of one of the insured depository institutions involved in the merger transaction. To what extent has this exception proven beneficial or detrimental to the bank resolution process and to financial stability? Should any requirements or controls be put into place regarding the use of this exemption, for example when considering purchase and assumption transactions in a large bank resolution? 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?

IBC Comment:

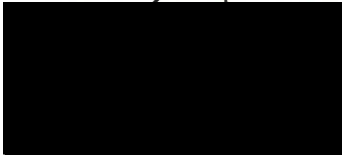
Question 10. To what extent would responses to Questions 1-9 differ for the consideration of merger transactions involving a small insured depository institution? Should the regulations and policies of the FDIC be updated to differentiate between merger transactions involving a large insured depository institution and those involving a small insured depository institution? If yes, please explain. How should the FDIC define large insured depository institutions for these purposes?

IBC Comment: As discussed throughout, IBC believes the FDIC's merger review framework should be tailored to provide special consideration and factors for small and mid-sized banks, particularly those in rural and underserved areas. Any merger of institutions under $100 billion (indexed for annual increase) should be reviewed in the context of the institutions' particular business philosophy and

practices. That review should include consideration of whether one (or both) of the institutions is (are) highly centralized or de-centralized and whether one or both offer(s) personal banking services, or is mostly remote and online-based. There is a world of difference between one or two large banks entering into mergers to solidify their dominance, and two small banks merging because neither could remain solvent on its own due to the crushing costs of regulatory compliance. The merger review guidelines should be adapted to address this fundamental discrepancy.

Thank you for the opportunity to share IBC's view.

INTERNATIONAL BANCSHARES CORPORATION



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