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June 13, 2024

*Via Electronic Mail*

James P. Sheesley, Assistant Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: Request for Comment on Proposed Statement of Policy on Bank Merger Transactions (RIN 3064-ZA31)

Agency Information Collection Activities: Proposed Collection Renewal; Comment Request (OMB No. 3064-0015)

Dear Mr. Sheesley:

Thank you for the opportunity to comment on the FDIC's proposed Statement of Policy on Bank Merger Transactions (Proposed SOP).[1] By way of background, I am an Assistant Professor of Business Law at the University of Michigan's Stephen M. Ross School of Business and Co-Faculty Director of the University of Michigan's Center on Finance, Law & Policy. Previously, I was an attorney at the Board of Governors of the Federal Reserve System, where I advised the Board on the legal permissibility of mergers and acquisitions. In 2023, I served as Counsel to the Assistant Attorney General for Antitrust, focusing on bank merger policy. As an academic, I have written extensively about the need to strengthen bank merger oversight.[2]

I write in support of the Proposed SOP. For too long, regulators have treated bank merger oversight as a "check-the-box" exercise. As I have previously explained, the current regulatory framework for bank mergers creates an implicit presumption of approval.[3] When a proposed merger satisfies certain minimum standards relating to Herfindahl-Hirschman Index (HHI) thresholds, Community Reinvestment Act (CRA) scores, and confidential management ratings, the agencies' analysis typically stops there, and the merger is approved.

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[1] Request for Comment on Proposed Statement of Policy on Bank Merger Transactions, 89 Fed. Reg. 29,222 (Apr. 19, 2024) [hereinafter Proposed SOP].

[2] *See, e.g.*, Jeremy C. Kress, *Modernizing Bank Merger Review*, 37 YALE J. ON REGUL. 435 (2020); Jeremy C. Kress, *Reviving Bank Antitrust*, 72 DUKE L.J. 519 (2022).

[3] Letter from Jeremy C. Kress to Martin J. Gruenberg, Acting Chairman, Fed. Deposit Ins. Corp. (May 31, 2022), https://www.fdic.gov/resources/regulations/federal-register-publications/2022/2022-rfi-rules-regulations-statements-of-policy-regarding-bank-merger-transactions-3064-za31-c-016.pdf.

This permissive approach to bank consolidation is not what Congress intended. The Bank Merger Act instructs the banking agencies to carefully evaluate a proposed merger's effect on the convenience and needs of the community to be served, financial stability, competition, and the institutions' future prospects, among other factors.[4] The bank merger review process is not supposed to be a "check-the-box" exercise; rather, the agencies are required to closely scrutinize the advantages and drawbacks of each proposed merger and authorize only those transactions that advance the public interest.

The Proposed SOP would help reorient the bank merger review process toward the forward-looking, case-by-case evaluation that the Bank Merger Act demands. In particular, the Proposed SOP would strengthen the FDIC's evaluation of bank merger proposals by (1) clarifying that a bank merger must *improve* a bank's ability to meet the needs of its community, (2) establishing a $100 billion asset threshold for heightened financial stability scrutiny, and (3) shifting the antitrust analysis away from outdated HHI deposit thresholds to a more multi-dimensional assessment of competition. I urge the FDIC to adopt these reforms, along with certain additional enhancements I suggest below.

These reforms are critically important for protecting consumers, small businesses, and the broader financial system. For decades, the banking agencies' lax oversight of bank mergers has harmed society in several ways. For example, under the banking agencies' prevailing approach, bank mergers have made it harder and more expensive for consumers to obtain credit, increased the fees that banks charge their customers, and reduced the interest rates that banks pay to their depositors.[5] Bank consolidation has likewise impaired local economic development: bank mergers have been associated with lower small business lending, less small business formation, higher unemployment, and wider income inequality.[6] These negative outcomes have proven to be especially acute for low- and moderate-income (LMI) and minority communities.[7] Meanwhile, the agencies' deferential approach to bank mergers has produced numerous "too big to manage" conglomerates that have intensified risks to financial stability.[8]

To be sure, bank mergers are not inherently objectionable. Some mergers—particularly among small community banks—can be socially beneficial.[9] The Proposed SOP is generally well designed to flag proposed mergers that pose the greatest risk of societal harm for closer scrutiny while allowing unobjectionable mergers to continue receiving swift approval.

The remainder of my comment letter addresses five substantive areas of the Proposed SOP: (1) monopolistic or anticompetitive effects, (2) financial and managerial resources and future prospects, (3) convenience and needs of the community to be served, (4) risk to the stability of the

[4] *See* 12 U.S.C. § 1828(c)(5).

[5] *Modernizing Bank Merger Review*, *supra* note 2, at 459; *Reviving Bank Antitrust*, *supra* note 2, at 555-57.

[6] *Modernizing Bank Merger Review*, *supra* note 2, at 460; *Reviving Bank Antitrust*, *supra* note 2, at 559-61.

[7] *Modernizing Bank Merger Review*, *supra* note 2, at 459-60; *Reviving Bank Antitrust*, *supra* note 2, at 557-59.

[8] *Modernizing Bank Merger Review*, *supra* note 2, at 461-62; *Reviving Bank Antitrust*, *supra* note 2, at 568-72.

[9] *See, e.g.*, Adel A. Al-Sharkas et al., *The Impact of Mergers and Acquisitions of the US Banking Industry: Further Evidence*, 35 J. BUS. FIN. & ACCT. 50, 62-64 (2008) (documenting that mergers involving small banks result in larger cost efficiency improvements than mergers involving larger banks).

U.S. banking or financial system, and (5) other matters and considerations. For each area, I highlight the ways in which the Proposed SOP would improve bank merger oversight, and I suggest additional enhancements the FDIC should implement when finalizing the proposal.

## I. Monopolistic or Anticompetitive Effects

The Proposed SOP would modernize the FDIC's assessment of a merger's competitive effects by deemphasizing the 1995 Bank Merger Guidelines and replacing them with a more robust and multi-dimensional analysis. The 1995 Bank Merger Guidelines and the FDIC's current statement of policy use local market deposit HHIs as a proxy for concentration and competition. This approach was initially implemented three decades ago at a time when many banks were still limited to operating within a circumscribed geographic area, and when banks were legally prohibited from affiliating with other financial companies. In the ensuing decades, the U.S. financial system has changed dramatically.[10] The Proposed SOP correctly recognizes that a narrow, deposit-based HHI analysis alone may not accurately reflect how banks actually compete or how a proposed merger might threaten that competition. In particular, the Proposed SOP helpfully states that the FDIC will consider other dimensions of competition, including "information on the pricing of products and services," to assess a merger's legality.[11]

I urge the FDIC to strengthen the Proposed SOP by stating that the agency will closely scrutinize the competitive effects of mergers involving larger banks. The pathways through which a large bank merger affects competition may differ materially from a merger involving only smaller institutions. For example, a large bank merger may increase threats to competition associated with coordinated effects or multi-market contacts.[12] In addition, a large bank merger could distort competition by creating or expanding an implicit "too-big-to-fail" funding subsidy that gives the large bank a funding advantage over its competitors.[13] Further, a merger involving a large bank may impair competition if the acquirer changes the target's business model or no longer competes as aggressively for the target's customers, such as small business clients.[14] These considerations were generally not salient when the 1995 Bank Merger Guidelines and the FDIC's current statement of policy were written because the largest U.S. banks were much smaller than they are now. In today's financial system, however, antitrust authorities must pay special attention to the unique threats to competition posed by mergers involving large banks.

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[10] *See* Jonathan Kanter, Assistant Attorney General, U.S. Dep't of Just., Merger Enforcement Sixty Years After *Philadelphia National Bank* (June 20, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-address-brookings-institution.

[11] Proposed SOP, *supra* note 1, at 29,241.

[12] *See* John William Hatfield & Jonathan Wallen, Many Markets Make Good Neighbors: Multimarket Contact and Deposit Banking (July 31, 2023) (unpublished manuscript).

[13] *See* Elijah Brewer III & Julapa Jagtiani, *How Much Did Banks Pay to Become Too-Big-to-Fail and to Become Systemically Important?*, 43 J. FIN. SERVS. RSCH. 1 (2013).

[14] *See* Julapa Jagtiani, Raman Quinn Maingi & Erik Dolson, *How Important Are Local Community Banks to Small Business Lending? Evidence from Mergers and Acquisitions*, 12 J. MATHEMATICAL FIN. 382 (2022) ("The absence of local community banks that became a target of a merger or acquisition by non-local acquirers has, on average, led to local [small business lending] credit gaps that were not filled by the rest of the banking sector. . . .").

In addition to the substantive changes in the Proposed SOP, I commend the FDIC for proposing to update its Supplement to the Interagency Bank Merger Act Application.[15] Among the proposed changes, the FDIC would require merger applicants to provide "all studies, surveys, analyses and reports" prepared by or for any officers, directors, investment bankers, consultants, or third party advisors. These documents can provide critical insights into the parties' motivations for undertaking a merger, as well as the likely competitive consequences of the proposed combination. The Department of Justice and Federal Trade Commission generally require merging parties to submit similar materials under the Hart-Scott-Rodino Act. It is sensible for the federal banking agencies to require merging banks to submit these documents, as well.

The Proposed SOP acknowledges that competitive concerns with a proposed merger can sometimes be addressed through the divestiture of branches or business lines, but it appropriately recognizes that any divestiture agreement must be subject to several protections to ensure its efficacy. In particular, the Proposed SOP states that the FDIC may require any divestitures to be completed before allowing the merger to be consummated.[16] Additionally, the Proposed SOP provides that the FDIC "will generally require that the selling institution will not enter into non-compete agreements with any employee of the divested entity nor enforce any existing non-compete agreements with any of those entities."[17] These protections are appropriate to help ensure that divested business line or branches can successfully replace competition that is lost because of the proposed merger.

When finalizing the Proposed SOP, the FDIC should state that it will consider how common ownership of the relevant institutions may affect competition in connection with a Bank Merger Act application. A bipartisan majority of the FDIC Board of Directors has already recognized that common ownership by institutional investors can influence how banks behave and compete.[18] Some empirical studies have also documented anticompetitive consequences of common ownership in banking.[19] As Professors José Azar, Sahil Raina, and Martin Schmalz cautioned, a banking agency's failure to consider common ownership in connection with a bank merger application "may lead to 'hidden' increases in bank concentration through partial common- and

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[15] Agency Information Collection Activities: Proposed Collection Renewal; Comment Request, 89 Fed. Reg. 29,245 (Apr. 19, 2024).

[16] Proposed SOP, *supra* note 1, at 29,241.

[17] *Id.*

[18] *See* Statement by Jonathan McKernan, Director, FDIC, Board of Directors, on His Proposal to Enhance Monitoring of Compliance with Passivity Commitments and Other Conditions in FDIC-Control Comfort (Apr. 25, 2024), https://www.fdic.gov/news/speeches/statement-jonathan-mckernan-director-fdic-board-directors-his-proposal-enhance; Statement of CFPB Director Rohit Chopra, Member, FDIC Board of Directors, on Reviewing Investments in and Takeovers of Banks (Apr. 25, 2024), https://www.consumerfinance.gov/about-us/newsroom/statement-of-cfpb-director-rohit-chopra-member-fdic-board-of-directors-on-reviewing-investments-in-and-takeovers-of-banks/.

[19] *See* José Azar, Sahil Raina & Martin Schmalz, *Ultimate Ownership and Bank Competition*, 51 FIN. MGMT. 227, 247-67 (2022) (documenting anticompetitive consequences of common ownership in banking, including deposit rates, maintenance fees, and fee thresholds). *But see* Serafin Grundl & Jacob Gramlich, *Assessing the Common Ownership Hypothesis in the US Banking Industry* (Bd. of Governors of the Fed. Rsrv. Sys. Fin. & Econ. Discussion Series, Working Paper No. 2024-022), https://www.federalreserve.gov/econres/feds/files/2024022pap.pdf (finding negligible effects of common ownership on bank deposit rates).

cross-ownership links that can cause adverse effects on bank competition."[20] Accordingly, the FDIC should supplement the Proposed SOP by specifying that it will consider common ownership when evaluating the potential competitive effects of a Bank Merger Act application.

## II. **Financial and Managerial Resources and Future Prospects**

The Proposed SOP states that the FDIC expects that, following a merger, the resulting bank will be in sound financial and managerial condition. Critically, the Proposed SOP also provides that the FDIC "may impose, as a non-standard condition, capital requirements that are higher than applicable capital standards."[21] Business combinations pose unique risks to merging banks, and it may be appropriate for the FDIC to force a merging bank to maintain more than the minimum required amount of capital to account for unforeseen challenges.[22] The FDIC should include this provision when it finalizes the Proposed SOP, and it should use the non-standard condition in appropriate circumstances.

## III. **Convenience and Needs of the Community to Be Served**

Perhaps the Proposed SOP's most important provision is its assertion that "the FDIC expects that a merger between two IDIs will enable the resulting IDI to *better* meet the convenience and needs of the community to be served than would occur absent the merger."[23] Under the Bank Merger Act, the public interest is of paramount importance. Despite this mandate, however, the banking agencies have not prioritized the public interest in bank merger reviews. To the contrary, the agencies' public interest analyses have typically been perfunctory and have often focused on (1) backward-looking assessments of banks' CRA performance records, and (2) advantages to the merging banks, such as projected cost savings, rather than to their customers. Critically, the Proposed SOP would clarify that the FDIC's review of convenience and needs "is not limited to the CRA record of the institutions" and instead will include a "broad review" of how the merger could affect the convenience and needs of the community in the future.[24]

The Proposed SOP's prospective approach, and its recognition that a merger must enable the resulting bank to *better* meet the convenience and needs of the community, represents a warranted return to the original understanding of the Bank Merger Act. The House of Representatives committee report on the Bank Merger Act of 1960 stated that "[w]e are convinced … that *approval of a merger should depend on a positive showing of some benefit* to be derived from it."[25] Moreover, Congress emphasized that the "burden should be on the proponents of a merger to show

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[20] Azar et al., *supra* note 19, at 234.

[21] Proposed SOP, *supra* note 1, at 29,241.

[22] *See* Filippo Curti, W. Scott Frame & Atanas Mihov, *Are the Largest Banking Organizations Operationally More Risky?*, 54 J. MONEY, CREDIT & BANKING 1223, 1225 (2022) ("Assets from recent M&A are especially important for operational losses, highlighting elevated operational risks from M&A activity.").

[23] Proposed SOP, *supra* note 1, at 29,242 (emphasis in original).

[24] *Id.*

[25] H. REP. NO. 86-1416, at 11-12 (1960) (emphasis added).

that it is in the public interest, if it is to be approved."[26] The Proposed SOP's approach to convenience and needs is therefore fully consistent with legislative intent that a merger must enhance the resulting bank's ability to serve the public for it to warrant approval.

I commend the FDIC on two specific features of the Proposed SOP's approach to the convenience and needs of the community. First, the Proposed SOP provides that the "FDIC will evaluate all projected or anticipated branch expansion, closings, or consolidations for the first three years following consummation of the merger."[27] This commitment to review projected branch closings is critical because the banking agencies have historically failed to consider reductions in branch access as part of their merger evaluations. Historically, merging banks have not even disclosed planned branch closures during the application process. The Proposed SOP's commitment to review projected branch closings is essential to ensure that an important aspect of the "convenience and needs of the community" does not escape regulatory review. FDIC Director Rohit Chopra has suggested that "[t]o avoid a bait and switch, it would make sense to add a condition to approval orders restricting the ability of banks to close branches beyond those listed in the application."[28] I encourage the FDIC to add this statement to the Proposed SOP to help ensure that post-merger branch closures do not harm consumers and communities.

Second, the Proposed SOP asserts that "claims and commitments made to the FDIC to support the FDIC's evaluation of the expected benefits of the merger may be included in the Order, and the FDIC's ongoing supervisory efforts will evaluate the IDI's adherence with any such claims and commitments."[29] Merger applicants often make grand promises—or enter into community benefit agreements—vowing to expand loan volumes, introduce new products and services, or reduce prices and fees. However, these assertions and agreements have not traditionally been treated as legally enforceable, and banks have sometimes fallen short of their commitments after obtaining merger approval.[30] Including these claims and commitments in the FDIC's approval Order, treating them as legally enforceable, and using the FDIC's supervisory process to evaluate a bank's ongoing compliance is essential to ensure accountability for promises the bank makes in connection with its merger application. The FDIC should retain this provision when it finalizes the Proposed SOP, and it should include claims and commitments made in connection with a merger application in its approval Order as standard practice going forward.

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[26] *Id.* at 12.

[27] Proposed SOP, *supra* note 1, at 29,242. The FDIC adds that it "considers a substantially complete merger application to include … at least three years of information regarding projected branch expansions, closings, or consolidations." *Id.* n.37.

[28] Prepared Remarks of CFPB Director Rohit Chopra at the Peterson Institute for International Economics Event on Revitalizing Bank Merger Review, CONSUMER FIN. PROT. BUREAU (Mar. 21, 2024), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-rohit-chopra-at-the-peterson-institute-for-international-economics-event-on-revitalizing-bank-merger-review/#12.

[29] Proposed SOP, *supra* note 1, at 29,242.

[30] *See, e.g.*, David Dayen, *KeyBank Promised to Increase Low-Income Lending, Then Did the Opposite*, AM. PROSPECT (Dec. 13, 2022), https://prospect.org/economy/keybank-promised-increase-low-income-lending/.

## IV. Risk to the Stability of the U.S. Banking or Financial System

The Proposed SOP would, for the first time, codify the FDIC's approach to analyzing financial stability in the context of a bank merger application. Congress added this factor to the Bank Merger Act in 2010 in light of the role that large bank mergers played in triggering the 2008 financial crisis.[31] Regrettably, the federal banking agencies' initial efforts to implement this statutory factor have been overly permissive of large bank consolidation. As just one example, the Federal Reserve Board—which pioneered the financial stability approach used by all the federal banking agencies—approved a major acquisition by Silicon Valley Bank (SVB) in 2021, concluding that SVB "would not be … so interconnected with other firms or markets that it would pose significant risk to the financial system in the event of financial distress."[32] When SVB collapsed less than two years later, that conclusion proved to be woefully incorrect.

The Proposed SOP would improve on current practice by establishing a $100 billion asset threshold for heightened financial stability scrutiny. Specifically, the Proposed SOP states that "transactions that result in a large IDI (*e.g.*, in excess of $100 billion) are more likely to present potential financial stability concerns … and will be subject to added scrutiny."[33] This $100 billion threshold is appropriate both as a matter of policy and law. Recent experience—including the dramatic failure of Signature Bank in 2023 and the near-failure of New York Community Bank in 2024—has demonstrated that banks with as little as $100 billion in assets can pose risks to financial stability. Furthermore, Congress has already recognized $100 billion as a salient threshold for financial stability purposes. The Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 specifically authorizes the Federal Reserve to apply enhanced financial stability standards to bank holding companies with $100 billion or more in total assets.[34] Collectively, these considerations demand that the FDIC apply heightened scrutiny to any proposed merger that would result in a bank with more than $100 billion in assets.

When evaluating financial stability in the context of a bank merger application, it is important to note that Congress instructed the FDIC to consider "the risk to the stability of the *United States* banking or financial system."[35] This statutory language suggests that the FDIC should deny a bank merger that poses risks to *domestic* financial stability, even if the merged firm would not threaten *global* financial stability. The FDIC should therefore reject efforts by the banking sector to shift the goalposts—for example, by suggesting that financial stability considerations are consistent with approval as long as a merger would not result in a "global systemically important bank" (GSIB). Congress was clearly concerned when a merger would produce a *domestic systemically important bank*, and the FDIC must apply the financial stability factor with this threshold in mind.

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[31] *See, e.g.*, Gregor N.F. Weiss et al., *Systemic Risk and Bank Consolidation: International Evidence*, 40 J. BANKING & FIN. 165, 174-177 (2014) (finding a significant increase in the post-merger systemic risk of consolidating banks and their competitors).

[32] SVB Financial Group, Order Approving the Merger of Bank Holding Companies, the Merger of Banks, and the Establishment of Branches (FRB Order No. 2021-08), https://www federalreserve.gov/newsevents/pressreleases/files/orders20210610a1.pdf.

[33] Proposed SOP, *supra* note 1, at 29,243.

[34] Pub. L. No. 115-174, § 401(a), 132 Stat. 1296, 1356-57 (2018) (codified at 12 U.S.C. § 5365(a)(1)(C)).

[35] 12 U.S.C. § 1828(c)(5) (emphasis added).

The Proposed SOP would also improve on current practice by clarifying that "the resulting IDI's regulatory framework … alone would not result in a favorable finding on this factor when other financial stability concerns exist."[36] In the past decade, the federal banking agencies have sometimes justified the approval of a large bank merger on the ground that the resulting firm would be subject—or the target's assets would become subject—to a more stringent regulatory framework that would mitigate any resulting financial stability risks.[37] As a practical matter, this rationalization is unconvincing because the prudential regulatory framework has proven inadequate to prevent financial instability, such as that which occurred in March 2023. In addition, this rationalization is deeply unwise because—taken to the extreme—it could be used to justify a GSIB's acquisition of any non-GSIB on the basis that the target's assets would become subject to Category I prudential rules. Finally, this rationalization is inconsistent with federal banking law. The Dodd-Frank Act instructed the banking agencies to *both* (1) apply enhanced prudential standards to the largest banking organizations, *and* (2) consider financial stability in bank merger applications. Justifying large bank mergers on the ground that the resulting firm would be subject to a more stringent regulatory framework effectively renders the financial stability factor superfluous—a result Congress certainly could not have intended. For these reasons, I encourage the FDIC to retain this provision when it finalizes the Proposed SOP.

## V. <u>Other Matters and Considerations</u>

I would like to highlight four other provisions the FDIC should retain or implement when it finalizes the Proposed SOP.

First, I commend the FDIC for asserting that "[i]f an applicant withdraws their filing, the Board of Directors may release a statement regarding the concerns with the transaction if such a statement is considered to be in the public interest for purposes of creating transparency for the public and future applicants."[38] The issuance of a public statement by the Board is appropriate when the FDIC allows an applicant to withdraw its filing in lieu of a formal denial. The FDIC has not denied a single bank merger application in the past 20 years, but over the same time period 116 applicants have withdrawn their filings for unknown reasons.[39] Increasing transparency in the disposition of bank merger applications is essential for democratic accountability. Moreover, the banking sector has frequently insisted that the federal banking agencies provide more transparency about which bank merger proposals are approvable, and which are not.[40] Although it is not a banking agency's role to provide *certainty* as to the acceptability of potential merger proposals, releasing a statement

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[36] Proposed SOP, *supra* note 1, at 29,243.

[37] *See, e.g.*, Morgan Stanley, Order Approving the Acquisition of a Savings and Loan Holding Company and Certain Nonbanking Subsidiaries (FRB Order No. 2020-05), https://www federalreserve.gov/newsevents/pressreleases/files/orders20200930b1.pdf ("Following the acquisition, all of E*TRADE's activities would be subject to the strictest standards.").

[38] Proposed SOP, *supra* note 1, at 29,240.

[39] *See id.* at 29,236.

[40] *See, e.g.*, DAVIS POLK, THE OCC'S PROPOSED REVISIONS TO BANK MERGER STANDARDS—A MISSED OPPORTUNITY FOR CERTAINTY (Feb. 6, 2024), https://www.davispolk.com/insights/client-update/occs-proposed-revisions-bank-merger-standards-missed-opportunity-certainty.

describing the Board's concerns with a withdrawn transaction would help provide future applicants with insight into issues that could prevent the approval of a transaction.

Second, I applaud the FDIC for assuring that it "will not use conditions as a means for favorably resolving any statutory factors that otherwise present material concerns."[41] Historically, the banking agencies have sometimes used non-standard conditions in an approval order in a misguided attempt to get to "yes" on a problematic bank merger application. For example, in its approval of New York Community Bank's (NYCB's) merger with Flagstar in 2022, the OCC included a non-standard condition preventing the merged bank from declaring or paying dividends without the OCC's prior written approval for a period of two years "[t]o ensure Flagstar NA has sufficiently allocated resources to address any supervisory issues that arise post-merger."[42] Supervisory issues ultimately did arise, but the OCC did not object to the merged bank's payment of dividends until too late, necessitating an emergency private-sector cash infusion.[43] This experience demonstrates the danger of relying on non-standard conditions to justify a merger that otherwise does not merit approval. The FDIC should retain this provision when it finalizes the Proposed SOP.

Third, the FDIC should commit to limiting "charter shopping" in connection with bank merger applications. Charter shopping—wherein a bank switches, or threatens to switch, its chartering authority to obtain approval of a merger—has become all too frequent. Most infamously, NYCB restructured its merger agreement with Flagstar in 2022 after the FDIC initially raised supervisory concerns, only to receive approval from the OCC soon thereafter.[44] Charter shopping undermines effective bank supervision and incentivizes a "race-to-the-bottom" in bank merger oversight. The FDIC should clarify in its final policy statement that it is unlikely to approve a merger when the applicant has (1) recently switched its charter in anticipation of filing a merger application, or (2) has restructured the transaction after it (or its merger partner) previously submitted a merger application to a different banking agency.

Finally, I encourage the FDIC to amend its Supplement to the Interagency Bank Merger Act Application to require a bank merger applicant to submit an integration plan with its initial application. The Federal Reserve Board has proposed such a change to Form FR Y-3, *Application to Become a Bank Holding Company and/or Acquire an Additional Bank or Bank Holding Company*.[45] The Federal Reserve's proposal instructs an applicant to provide a copy of its "integration plan to merge the operations of the combined organization" and "specify how risk management systems, operational processes, products and services, and other functions/processes of the Applicant and Target companies would be combined to achieve the strategic, financial, and

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[41] Proposed SOP, *supra* note 1, at 29,239.

[42] OCC Conditional Approval #1299 (Nov. 2022), https://occ.treas.gov/topics/charters-and-licensing/interpretations-and-actions/2022/ca1299.pdf.

[43] *See* Pete Schroeder, Michelle Price & Koh Gui Quin, *US Regulators Greenlit NYCB's Rapid Growth, Even With Red Flags*, REUTERS (Mar. 7, 2024), https://www.reuters.com/markets/us/us-regulators-greenlit-nycbs-rapid-growth-even-with-red-flags-2024-03-07/.

[44] *See id.*

[45] Proposed Agency Information Collection Activities; Comment Request, 89 Fed. Reg. 34,246 (Apr. 30, 2024).

operational goals of the proposed transaction."[46] The Federal Reserve's proposal also requires an applicant to delineate expected timelines for key integration milestones.[47] This information is essential to a banking agency's evaluation of the combined organization's managerial resources and future prospects. Indeed, it is difficult to imagine how a banking agency could adequately assess a bank merger application *without* reviewing the applicant's integration plan. Accordingly, the FDIC should amend its Supplement to require a bank merger applicant to submit its integration plan as a matter of standard practice.

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Thank you again for the opportunity to comment on this proposal. Please do not hesitate to contact me if I can provide any additional information.

Sincerely,

Jeremy C. Kress

[46] *Instructions for Preparation of Application to Become a Bank Holding Company and/or Acquire an Additional Bank or Bank Holding Company*, https://www federalreserve.gov/apps/reportingforms/Download/DownloadAttachment?guid=105D79CE-BB3E-4BC9-BE9C-DE996DDBA07F.

[47] *See id.*