June 14, 2024

Via Electronic Mail

Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429
Attention: Comments-RIN: 3064-ZA31

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

Ladies and Gentlemen:

The Bank Policy Institute[1] is filing this comment in response to the Statement of Policy on Bank Merger Transactions issued by the Federal Deposit Insurance Corporation entitled *Request for Comment on Proposed Statement of Policy on Bank Merger Transactions*[2] and the accompanying notice and request for comment entitled *Agency Information Collection Activities: Proposed Collection Renewal; Comment Request*.[3]

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1 BPI is a nonpartisan public policy, research and advocacy group that represents universal banks, regional banks, and the major foreign banks doing business in the United States. The Institute produces academic research and analysis on regulatory and monetary policy topics, analyzes and comments on proposed regulations, and represents the financial services industry with respect to cybersecurity, fraud, and other information security issues.

2 FDIC, Request for Comment on Proposed Statement of Policy on Bank Merger Transactions, 89 Fed. Reg. 29222 (Apr. 19, 2024).

3 FDIC, Agency Information Collection Activities: Proposed Collection Renewal; Comment Request, 89 Fed. Reg. 29245 (Apr. 19, 2024).

Executive Summary

- Policy Statement:

  We recommend that the FDIC withdraw the proposal for the following reasons:

  - Many parts of the proposed policy statement contradict sound policy, and certain parts exceed the FDIC's statutory authority. The effect would be significant, as neither potential acquirers nor targets would begin the costly and risky process of announcing a transaction and applying for regulatory approval if a regulator with approval authority has issued a policy statement indicating that disapproval was likely or even a meaningful possibility. As such, the policy statement constitutes a final rule in substance that effectively precludes (or, at a minimum, discourages) many meritorious bank merger and asset acquisition transactions.

  - The policy statement includes a broad description of transactions subject to FDIC approval under the BMA, including certain asset acquisition and internal reorganization transactions that are not mergers in substance,[4] which is inconsistent with the statutory text and Congressional intent.

  - The FDIC introduces a novel demand that applicants show that a transaction "better serve" a community's needs, which departs from the statutory mandate for agencies to "consider[] … the convenience and needs of the community to be served" and ignores the convenience and needs factor that is part of the competition analysis.[5]

  - The policy statement also effectively threatens to prohibit transactions that result in an insured depository institution in excess of $100 billion in assets, when the BMA has no such proscription and Congress has established a much higher proscription (approximately 20 times greater).[6] In the FDIC's condemnation of transactions involving large institutions, the FDIC focuses only on size without recognizing the many other factors that could determine whether such a transaction meets the statutory factors.

  - The FDIC now expresses a hostility to using conventional non-standard conditions as a way to facilitate the bank merger application process, which may lead to the FDIC rejecting or applicants withdrawing otherwise viable applications. Those rejections or withdrawals would result in significant amounts

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4 *See infra* Section I.A.

5 12 U.S.C. § 1828(c)(5)(B) ("The responsible agency shall not approve . . . any [] proposed transaction whose effect 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.").

6 *See infra* notes 81 and 82 and the accompanying text.

of wasted time and effort on the part of both the reviewing agency and the parties to a proposed transaction, with no discernible benefit to the broader financial system.

- Finally, the proposed publication of rejections or withdrawals could generate adverse reputational and economic consequences for both the acquirer and the target.

Any re-proposal should, at a minimum, address these concerns and be consistent with law and the bank merger guidance of the other federal banking agencies.

- FDIC Supplement: The FDIC proposes certain revisions to the supplement to the Interagency Bank Merger Act Application Form.[7] A number of the items in the proposed revised supplement capture information that parties typically submit to the federal banking agencies. However, we are concerned that certain of the new items requesting more granular information about the pro forma volume and amount of deposits and loans based on the recorded addresses of depositors or borrowers, as applicable, for each relevant geographic market will be difficult for applicants to satisfy.

  We recommend that the FDIC adopt targeted revisions that more closely reflect the data that is customarily available to acquirers at the application filing stage.

- Application Processing Timing: The FDIC's proposal is silent on how the agency plans to address the ever-increasing timing delays that plague the existing application review process. These delays are unpredictable and often extensive, and they routinely diverge, often significantly, from the FDIC's expected timeline of 60 days from receipt of a substantially complete application.[8] As Representative Barr noted, there are real costs associated with the "regulatory purgatory" that applicants frequently face, with the "uncertainty [that] looms over M&A approvals [resulting in] customers, shareholders and employees of the target bank [being] left on the hook indefinitely to see share prices drop and employees depart."[9]

  Separate and apart from this policy statement, we urge the FDIC to provide more detailed and accurate timing guidance in the FDIC's Bank Applications Procedures Manual as described in this letter.

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7 *See* 89 Fed. Reg. 29245, 29245; *see also* Redline, Supplement to Interagency Bank Merger Act Application, FDIC (2024), https://www.fdic.gov/resources/regulations/federal-register-publications/2024/2024-bank-merger-act-supplement-redline.pdf.

8 Applications Procedures Manual, FDIC 4-23, https://www.fdic.gov/regulations/applications/resources/apps-proc-manual/section-04-mergers.pdf (the "FDIC Mergers Manual").

9 Bloomberg Gov't, Transcript of House Fin. Servs. Comm.: Fin. Inst. Subcomm. Hearing on Merger Policies of the Federal Banking Agencies (May 1, 2024), at 10.

Introduction

Although we welcome the FDIC's stated objectives of "modernizing bank merger oversight" and "communicat[ing] the FDIC Board's expectations regarding the evaluation of merger applications filed pursuant to the [Bank Merger Act of 1960]"[10] to the public and industry participants,[11] the proposed policy statement itself is fundamentally misguided. The FDIC's proposal appears to reflect a basic premise that bank mergers are inherently detrimental to the best interests of the U.S. banking system and the public.[12] The FDIC does not provide any quantitative data or evidence-based rationale to support this premise beyond a general, and largely irrelevant, discussion of the decline in the overall number of banks in the U.S.[13] This discussion ignores many of the drivers of this decline, including, among other things: legislative changes in the 1990s allowing interstate banking;[14] "internal" mergers; the plummeting number of de novo charter approvals;[15] and most notably economies of scale—for example, with respect to technology, marketing, and the increased regulatory burdens following the 2008 financial crisis.[16] The FDIC also fails to acknowledge that many bank mergers produce benefits, as

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10 Pub. L. No. 86-463, 74 Stat. 129, 129 (1960); 12 U.S.C. § 1828(c) (as amended).

11 89 Fed. Reg. 29222, 29223.

12 *Accord* FDIC Director Jonathan McKernan, *Statement on the Proposed Statement of Policy on Bank Merger Transactions* (Mar. 21, 2024), https://www.fdic.gov/news/speeches/2024/spmar2124b.html (the "McKernan Statement") ("[T]his update makes explicit what we all sort of already knew – the FDIC takes a quite skeptical view of bank mergers. I am unable to support today's proposal because it reflects and would implement a bias against bank mergers that is bad policy and contrary to law.").

13 89 Fed. Reg. 29222, 29222–29223 (asserting that "growth and consolidation, which has been ongoing for the past several decades, has significantly reduced the number of smaller banking organizations, increased the number of large and systemically important banking organizations, and contributed to the need for a review of the regulatory framework that applies to bank merger transactions subject to the BMA").

14 *See* Bank Policy Institute & Mid-Size Bank Coalition of America, Letter re: Enforcement Policy Respecting Bank Mergers (Feb. 10, 2022), https://bpi.com/wp-content/uploads/2022/02/BPI-Responds-to-DoJ-Review-of-Competitive-Effects-of-Bank-Mergers.pdf ("2022 Comment Letter"), at 3 (explaining how the Riegle-Neal Interstate Banking and Branching Efficiency Act removed artificial and archaic geographic barriers to bank mergers and authorized the creation of interstate branch networks, which led to substantial consolidation in the banking industry).

15 Speech, Governor Michelle W. Bowman, *Bank Mergers and Acquisitions, and De Novo Bank Formation: Implications for the Future of the Banking System* (Apr. 2, 2024), https://www.federalreserve.gov/newsevents/speech/bowman20240402a.htm#f1 (the "Bowman Speech") (explaining the dangers of this trend); *see also* Federal Reserve Bank of Richmond, R. McCord & E. Simpson Prescott, *The Financial Crisis, the Collapse of Bank Entry, and Changes in the Size of Distribution of Banks*, Vol. 100, Econ. Quarterly No. 1 (2014), https://www.richmondfed.org/publications/research/economic_quarterly/2014/q1/prescott (suggesting that the requirements for de novo banks seeking deposit insurance by the FDIC are the primary reason underlying the collapse of entry into commercial banking in the aftermath of the financial crisis).

16 *See* FDIC, *FDIC Community Banking Study* (Dec. 2020) at VII–VIII, https://www.fdic.gov/resources/community-banking/report/2020/2020-cbi-study-full.pdf (suggesting that the increase in regulatory burden between 2008 and 2019 negatively impacted bank profits, especially for smaller community banks, and is a contributing factor to "the record rates at which community banks exited the banking industry in the years leading up to 2019").

stronger, more diversified banks are able to better serve their customers at lower risk to the financial stability of the U.S. financial system.[17]

Like a recent proposal from the Office of the Comptroller of the Currency,[18] this proposal would discourage beneficial and legally permissible bank merger transactions or even prevent them altogether.[19] Unreasoned hostility toward bank mergers is "bad policy and contrary to law."[20] Additionally, we believe that federal banking agencies must partner to "develop a regulatory framework that allows banks of all sizes and various business models to flourish, is not biased in favor of one class of bank over others, and otherwise leaves it up to the market and the American people to determine how banking assets are allocated across the system."[21] The country is better served by allowing acquisitions of viable banks by healthy banks than chaotic resolution of failed or failing banks.

The FDIC's proposal also reflects an absence of interagency coordination. If adopted, the FDIC's proposed policy statement would introduce novel principles that not only depart from the statutory scheme but also, without clear reason, diverge from other banking

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[17] Senior officials in the federal banking agencies share this sentiment. Although speaking in her individual capacity, Governor Michelle W. Bowman of the Federal Reserve said, in respect of the policy statement, "M&A transactions allow banks to thrive in our dynamic banking system, and help to promote the long-term health and viability of banks. M&A also ensures that some institutions have a meaningful path to transitioning bank ownership." Bowman Speech; *see also id.* (warning that in the absence of a "viable M&A framework," there may be "limited opportunities for succession planning, especially in smaller or rural communities" and added risk of "zombie banks that continue to exist but have no competitive viability or exit strategy"); *see also* FDIC Vice Chairman Travis Hill, *Statement on the FDIC's Proposed Statement of Policy on Bank Merger Transactions* (Mar. 21, 2024), https://www.fdic.gov/news/speeches/2024/spmar2124c.html (the "Hill Statement") ("[T]here may be instances in which a strong large bank purchasing a weak large bank would be quite helpful from a financial stability perspective. Last year, if a bank had been willing and able to buy First Republic on an open-bank basis, assuming the acquiring institution had the financial and operational capacity to do so, this would have been an unequivocal positive for financial stability, regardless of how the resulting institution measured up under the [policy statement]. I think the [policy statement] should state explicitly that this would be viewed favorably, even if the target was not yet on the verge of failure."). These opinions are also echoed by members of Congress. *See, e.g.*, Merger Policies of the Federal Banking Agencies, House Fin. Servs. Comm. (May 1, 2024) (Remarks by Representative Roger Williams) ("Mergers can help banks become more effective competitors, generate cost savings and promote a healthy competition and robust banking system. However, on the other side, mergers sometimes can be conducted out of necessity, such that when banks can't afford the expensive compliance costs that come along with burdensome regulations, which forces banks to consider mergers in order to spread these regulatory costs over a wider book of business.").

[18] OCC, Notice of Proposed Rulemaking: Business Combinations under the Bank Merger Act, 89 Fed. Reg. 10010 (Feb. 13, 2024) (the "OCC NPR"); *see also* Bank Policy Institute, Letter re: Notice of Proposed Rulemaking: Business Combinations under the Bank Merger Act (Docket ID OCC-2023-0017), (June 14, 2024) ("BPI OCC Comment Letter").

[19] *See also* Statement for the Record from the Bank Policy Institute before the House Financial Services Committee Subcommittee on Financial Institutions and Monetary Policy (May 1, 2024), https://bpi.com/clear-objective-ma-standards-benefit-bank-customers-and-the-economy/#:~:text=A%20healthy%20M%26A%20pipeline%2C%20with,the%20record%20for%20the%20House.

[20] McKernan Statement.

[21] Hill Statement.

agencies' current practice, particularly with respect to the FDIC's expansive view of the types of transactions that are subject to FDIC approval, its evaluation of the convenience and needs statutory factor, and its approach to the use of non-standard conditions.[22] We share the concerns of Representative Andy Barr, Chairman of the House Financial Services Subcommittee on Financial Institutions and Monetary Policy, who stated that, in the absence of interagency coordination on bank merger policy, the agencies' "different approval processes and standards [will] inject[] additional uncertainty, incentives for regulator shopping, and negative consequences for the dynamism of our banking system."[23] Accordingly, we urge the FDIC to partner with its peer agencies to establish coherent and consistent guidance for the U.S. banking industry. A streamlined and predictable bank merger policy will better promote a resilient banking industry that can best serve the needs of the U.S. economy.

Discussion

If adopted, the FDIC's proposed statement of policy likely will be subject to Administrative Procedure Act review.[24] Under the APA, agency rulemaking must "not … extend the scope of the [authorizing] statute beyond the point where Congress indicated it would stop."[25] Nor can rulemaking be arbitrary and capricious or otherwise contrary to law.[26] Generally, a rule is arbitrary and capricious where "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[27]

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[22] *See* Press Release, Acting Comptroller Issues Statement on the FDIC's Proposed Statement of Policy on Bank Merger Transactions, O.C.C. (Mar. 21, 2024), https://www.occ.treas.gov/news-issuances/news-releases/2024/nr-occ-2024-31.html (responding to the policy statement that "in some instances targeted conditions can mitigate specific risks from a proposed merger transaction" and "should be considered when they will be effective and where appropriate"); BPI Insights, *Barr Comments on CRA, M&A, Basel and Climate Disclosure at NCRC Event* (Apr. 6, 2024), https://bpi.com/bpinsights-april-6-2024/#:~:text=Barr%20said%2C%20%E2%80%9CWe%27re,whether%20those%20should%20be%20updated (describing how, in response to a question regarding whether the Federal Reserve would follow the OCC's and FDIC's lead in updating its M&A rules, Vice Chair Barr said: "We're not currently planning to do that. We have, I think, a pretty robust process that follows our existing guidelines in this area. We are working with the other banking agencies and the Justice Department to see whether those should be updated. But that's work that we're thinking about on an interagency basis rather than just us doing something.").

[23] Merger Policies of the Federal Banking Agencies, House Fin. Servs. Comm. (May 1, 2024) (Statement of Chairman Andy Barr), https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=409239.

[24] Notwithstanding the fact that the FDIC labels its proposal a "policy statement," courts will consider a regulatory proposal's substance to determine whether it is subject to review as a final agency action. *See Am. Tort Reform Ass'n* v. *OSHA*, 738 F.3d 387, 395 (D.C. Cir. 2013) (observing that even "if an agency issues a statement that is labeled … a policy statement," it may be considered a final agency action if "it has all of the indicia of a final legislative rule").

[25] *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

[26] 5 U.S.C. § 706(2)(A), (C); *accord City of Oberlin* v. *FERC*, 937 F.3d 599, 605 (D.C. Cir. 2019).

[27] *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). If an agency "chang[es] position," it must satisfy further requirements. *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The agency must "show that there are good reasons for the new policy" and, if

For the reasons discussed below, we submit that numerous aspects of the FDIC's policy statement are contrary to the BMA, extend beyond the scope of the statute and are arbitrary and capricious under the APA. Our commentary and specific recommendations are set out below.

I. Certain Aspects of the Policy Statement Exceed the Scope of the BMA and Contradict Sound Policy

As explained below, we believe that multiple components of the FDIC's policy statement exceed the scope of the FDIC's statutory authority and break from the bank merger review frameworks of the Federal Reserve and the OCC in meaningful ways. The practical effect of this policy statement will be to discourage sound bank mergers based on factors that are not only extra-statutory, but also contrary to well-reasoned public policy. The policy statement will also subject more transactions to the BMA application process than the statutory scheme allows and sound public policy supports. The policy statement, therefore, risks discouraging parties from undertaking beneficial transactions that would create a more stable banking system and better serve the public. To make matters worse, the policy statement also fails to address one of the most pressing problems banks confront today in their consideration of consolidation opportunities: the FDIC's unpredictable and protracted timeline for processing applications.

A. Comments on the Discussion of Jurisdiction and Scope[28]

i. De Facto *Mergers*[29]

The FDIC emphasizes in Section II of the proposed policy statement that the agency implements the BMA by focusing on "the substance of all of the facts and circumstances of the transaction and related transactions" over the form of the transaction.[30] As a generalized statement, this position can be consistent with the FDIC's practice of considering the BMA to require prior approval of *de facto* mergers.[31]

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the "new policy rests upon factual findings that contradict those which underlay [a] prior policy," it must provide a "more detailed justification than what would suffice for a new policy created on a blank slate." *Id*. Accordingly, an "[u]nexplained inconsistency" in agency policy is a "reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Nat'l Cable & Telecomm. Ass'n, et al.* v. *Brand X Internet Servs. et al.*, 545 U.S. 967, 981 (2005).

28 The discussion in this part is generally relevant to Section II of the policy statement (Jurisdiction and Scope) and Questions 1, 2 and 5 in the Supplementary Information.

29 The discussion in this part is specifically responsive to question 2 in the policy statement ("How can the FDIC increase clarity to interested parties regarding the applicability of the BMA to a merger in substance?") and question 4 ("Does the Proposed SOP sufficiently alert interested parties to the range of transactions that could be subject to FDIC approval under Section 18(c)(1)(B) of the BMA? If not, please comment on how the range of transactions could be more clearly articulated.").

30 89 Fed. Reg. 29222, 29239.

31 *See, e.g.*, FDIC Mergers Manual, at 4-1 n.2 (describing that a merger in substance is one in which "all or substantially all of a target entity's assets, and the target entity dissolves or otherwise ceases its main business operations"); FDIC Interpretive Letter 96-5 (Feb. 20, 1996) (opining that a transaction was not a merger or consolidation for purposes of the BMA in part because the seller "will continue to operate… its business").

Putting aside whether the plain language of the BMA allows for FDIC jurisdiction over *de facto* mergers,[32] the policy statement suggests that the FDIC intends to capture transactions beyond acquisitions that, under state law,[33] are considered substantively similar to "regular mergers," and therefore treated as *de facto* mergers.[34] Specifically, most state laws create a two-part test that replicates an actual merger: (i) a transfer of all, or substantially all, the assets and liabilities of the target company and (ii) a subsequent liquidation of the target company.[35] A minority of states impose only the first part of this test.[36] As numerous courts have recognized, anything less than this minority test is not a merger in substance.[37] Although the FDIC's stated purpose for this interpretation—"preventing evasion of the BMA"[38]—is legitimate, the policy statement is drafted in a sweeping manner that (x) effectively expands well beyond true *de facto* mergers and (y) would subject asset acquisitions to FDIC approval under the BMA even if the transaction would not result in the transfer of all or substantially all assets of a target or of successor liability for the acquirer, which are the hallmarks of a *de facto* merger

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32 We note that the express language of the BMA refers to mergers and asset transfers as two distinct categories of transactions. *See* 12 U.S.C. § 1828(c)(1) ("Except with the prior written approval of the responsible agency, which shall in every case referred to in this paragraph be the [FDIC], no insured depository institution shall—(A) *merge or consolidate with any noninsured bank or institution* . . . or (C) *transfer assets to any noninsured bank or institution* in consideration of the assumption of liabilities for any portion of the deposits made in such insured depository institution.") (emphasis added).

33 *See infra* notes 35 and 39 and accompanying text.

34 *See* FDIC Mergers Manual at 4-1 ("A regular merger is a combination of the assets and liabilities of two or more nonaffiliated institutions under one institution's charter and the extinguishment or cancellation of the charter(s) of the other institution(s) . . . . Regular mergers are typically structured as mergers that are authorized by relevant statute.").

35 Under state corporate law, a merger in substance typically requires both (i) the transfer of all or almost all an entity's assets and (ii) the entity's subsequent liquidation. *See, e.g.*, *Matter of AT&S Transp., LLC* v. *Odyssey Logistics & Tech. Corp.*, 22 A.D.3d 750, 752–53 (N.Y. App. Div. 2005) (finding a *de facto* merger when the buyer acquired "substantially all of the assets of" the target and the target was deemed to be liquidated); *Schumacher* v. *Richards Shear Co.*, 59 N.Y.2d 239, 244 (1983) (holding that the transfer of all of an entity's assets and liabilities in connection with the liquidation of that entity was a merger in substance); *Hariton* v. *Arco Electronics, Inc.*, 188 A.2d 123, 124–25 (Del. 1963) (observing that the sale of all of an entity's assets and the dissolution of that entity "achieved the same result as a merger"); *CenterPoint Energy, Inc. Sup. Ct.*, 157 Cal. App. 4th 1101, 1103–04 (Cal. Ct. App. 2007) (describing a *de facto* merger as occurring "where the purchaser acquires *all assets … and the seller dissolves*) (emphasis added); *Fenderson* v. *Athey Prods. Corp.*, 220 Ill. App. 3d 832, 835, 839 (Ill. Ct. App. 1991) (finding a *de facto* merger occurred because, among other things, the buyer acquired substantially all of the seller's assets and the seller liquidated shortly thereafter).

36 *See generally* 20 Am. Juris. Proof of Facts 2d. § 1 (Apr. 2024) (discussing how a majority of U.S. states include as a core element of the *de facto* merger analysis the seller's liquidation and dissolution as soon as legally and practically possible following the relevant transaction).

37 *See, e.g.*, *Spring Real Estate, LLC* v. *Echo/RT Holdings, LLC*, 2013 WL 6916277, at *4–5 (Del. Ch. Ct. Dec. 2013) (observing that Delaware does not recognize "statutorily compliant asset sales" as *de facto mergers* and holding that the plaintiffs failed to establish the asset transaction as a *de facto* merger because the seller continued its corporate existence following the sale); *Buja* v. *KCI Konecranes Intern. Plc.*, 12 Misc.3d 859, 815 N.Y.S.2d 412, 416–417 (N.Y. Sup. Ct. Apr. 2006) (finding that there was no *de facto* merger where there was not "a cessation of business and dissolution" of the seller following the transaction).

38 89 Fed. Reg. 29222, 29226.

under state corporate law.[39] For example, the policy statement indicates that an IDI's acquisition of a line of business from a target that continues to exist and engage in business other than the acquired line of business would be subject to FDIC approval under the BMA, potentially even if the acquisition would not qualify as a *de facto* merger under state law.[40]

We suggest that the FDIC withdraw the policy statement; any re-proposal must be amended in the following key respects. First, we recommend that any re-proposed policy statement expressly acknowledge that the *de facto* mergers that are subject to FDIC approval under the BMA represent a rare category of transactions under state corporate law[41] and involve the transfer of all or substantially all of a target's assets, as well as the transfer of successor liability to the acquirer and the subsequent dissolution of the target.[42] Second, the FDIC should explicitly state in any re-proposed policy statement that the agency's intent is not to subject asset acquisitions that would not qualify as *de facto* mergers under state corporate law to a filing requirement under the BMA. Absent these changes, the policy statement would exceed the FDIC's grant of authority to review transactions under the BMA.

B. Comments on the Discussion of Statutory Factors[43]

Section III of the policy statement addresses the FDIC's interpretation of the factors required to be considered under the BMA in merger applications.

i. Convenience and Needs of the Community

1. <u>No Statutory Requirement for an Affirmative Showing of "Better" Meeting the Convenience and Needs of the Community</u>

Under the BMA, an agency responsible for reviewing a bank merger application must "take into consideration," among other things, "the convenience and needs of the community to be served."[44] The FDIC has historically treated this factor as an analysis of how a

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[39] *See, e.g.*, *State Farm First & Cas. Co.* v. *Main Bros. Oil Co.*, 101 A.D.3d 1575, 1578-79 (N.Y. App. Div. 2012) ("Under the concept of de facto merger, a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased.") (internal quotation marks and citations omitted); *Cleveland-Cliffs Burns Harbor LLC* v. *Boomerang Tube, LLC*, 2023 Del. Ch. LEXIS 359, at *25–26 (Del. Ch. Ct. Sept. 5, 2023) (summarizing that one of the four necessary elements of a *de facto* merger under Delaware law is the buyer's assumption of all the target's liabilities).

[40] 89 Fed. Reg. 29222, 29239 ("An example of a transaction that is a merger in substance, and therefore subject to the BMA, is when an IDI absorbs all (or substantially all) of a target entity's assets and the target entity dissolves (*or otherwise ceases to engage in the acquired lines of business*).") (emphasis added).

[41] 1 Tax Planning for Corporations and Shareholders § 11.03(4) (observing that generally, "[d]e facto mergers are rare").

[42] *See supra* note 35.

[43] The discussion in this part is generally responsive to Section III of the policy statement (Statutory Factors—Convenience and Needs of the Community to be Served) and Questions 20, 21, 22, 23, and 25 in the Supplementary Information.

[44] 12 U.S.C. § 1828(c)(5).

resulting institution would adequately serve the convenience and needs of its communities.[45] However, the FDIC's proposed policy statement "would go much further" than this:[46] the FDIC proposes that it will now require an applicant to "demonstrate" how a proposed transaction "will enable the resulting IDI to *better* meet the convenience and the needs of the community."[47] The FDIC specifies that this showing could include, for example, higher lending limits, greater access to products and services, the addition of new or enhanced products or services, reduced costs, increased convenience, or similar features.[48]

This showing, which FDIC Deputy General Counsel James Anderson conceded was "certainly something new,"[49] does not have a basis in either the plain meaning of the BMA or the statute's legislative history. The express language of the BMA requires agencies to "*take into consideration* . . . the convenience and needs of the community to be served."[50] Additionally, the legislative history of the BMA indicates that Congress did not intend for agencies to impose this burden as a condition for bank merger approval: in 1966, Congress amended the BMA to, among other things, *eliminate* that a transaction be "in the public interest" as a condition for approval, in favor of the more flexible, nuanced requirement to consider the needs of the community.[51] Indeed, when Congress intended to require an applicant to make a showing requiring a betterment of convenience and needs it did so expressly, and there only as an offsetting factor to an adverse effect on competition.[52] Accordingly we "have not been persuaded that there is a basis in law" for the FDIC's proposed requirement that a resulting institution *better serve* the community.[53] Nor are we aware of any other agency responsible for

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45 *See, e.g.*, FDIC, Order and Basis for Corporation Approval (approving the merger of Branch Banking and Trust Company and SunTrust Bank) (Nov. 19, 2019) at 8–10, https://www.fdic.gov/sites/default/files/2024-03/pr19111a.pdf (evaluating the merger parties' records of meeting community credit needs and indicating that "no concerns were identified that would indicate that [the resulting institution] would not adequately serve the convenience and needs of the communities to be served").

46 Hill Statement.

47 89 Fed. Reg. 29222, 29242.

48 *Id.*

49 *See* Merger Policies of the Federal Banking Agencies, Fin. Servs. Comm. (May 1, 2024) (Remarks of Deputy General Counsel, FDIC, James L. Anderson) (conceding that the requirement that a combined institution better meet the convenience and needs of the community "is certainly something new").

50 12 U.S.C. § 1828(c)(5) (emphasis added).

51 Pub. L. No. 89-356, 80 Stat. 7, 8 (1966). The 1960 version of the BMA instructed banking agencies not to approve any merger "unless, after considering all of [the statutory] factors," the agency found the merger "to be in the public interest." Pub. L. No. 86-463, 74 Stat. 129 (1960). In 1966, however, Congress removed this requirement, in part to ensure that the agencies had the ability to "give full consideration to all aspects of the public interest, and take into consideration all elements of competition and all elements entering into the convenience and needs of those who are to be served by the resulting bank" of a merger. Pub. L. No. 89-356, 80 Stat. 4-5 (1966).

52 *See supra* note 5.

53 McKernan Statement ("I have not been persuaded that there is a basis in law for an expectation that the post-merger bank do 'better' on the convenience and needs factor.").

implementing the BMA imposing such a requirement.[54] The FDIC should, therefore, remove this requirement from any re-proposed policy statement.

2. Forward-Looking Information

To satisfy the novel requirement that a transaction "better serve" the convenience and needs of the community, the policy statement would require that an applicant submit "specific and forward-looking information" that enables the FDIC to evaluate the expected benefits of the merger.[55] This required information would include at least a three-year projection for all future branch plans.[56] The FDIC would also "evaluate all projected or anticipated branch expansion, closings, or consolidations"[57] for the three years after the merger's consummation. Additionally, the policy statement indicates that any "claims and commitments" made with respect to any such forward-looking plans would be evaluated by the FDIC on an ongoing basis to "evaluate the IDI's adherence to any such claims and commitments."[58]

The FDIC asked about the specific challenges that applicants will face in providing this kind of forward-looking information.[59] We believe that this requirement may be difficult to satisfy with accurate data, meaning that applicants may simply be "unable" to provide evidence "*ex ante* to the satisfaction of the FDIC."[60] For instance, it may be difficult for parties to anticipate specific branch plans prior to the closing of the transaction because information related to branch integration and community needs necessary to make these plans may become available to the parties *only post-closing*. In such cases, the FDIC's position would put applicants in the impossible position of having to make plans about the needs of communities before they have even completed the transaction and thereby gain full access to the relevant information.[61] This issue is exacerbated by the FDIC's proposal to treat these plans as multi-

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54 *See, e.g.*, Federal Reserve, Order Approving the Acquisition of a Bank Holding Company and the Merger of Bank Holding Companies (Jan. 17, 2023) at 37–41, https://www.federalreserve.gov/newsevents/pressreleases/files/orders20230117a1.pdf (approving BMO Financial Corp.'s acquisition of BancWest Holding Inc.) (considering "how the combined organization would meet the convenience and needs of the community to be served," including by analyzing, among other things, how the acquirer would "continue to invest in low-income housing tax credits," "continue to follow its branch closing and consolidation policy and adhere to all regulatory requirements in connection with any possible future branch actions" and "not discontinue any community development activities"); OCC, OCC Control No. 2022-LB-Combination-325300, 2023 WL 2370113, at *7, *7 n.20 (Jan. 17, 2023) at 8–9 (approving the merger of Bank of the West with and into BMO Harris Bank, N.A.) (stating that its convenience and needs assessment evaluates "how the combined bank will help to meet the needs of its community on a prospective basis" and noting that although "[s]ome commenters … asserted that the OCC should only approve the merger if it finds a public benefit," "[t]he BMA requires [the OCC] to consider the convenience and needs of the community in connection with its review of a BMA application").

55 89 Fed. Reg. 29222, 29242.

56 *Id.* at 29242 n.37.

57 *Id.* at 29242.

58 *Id.*

59 *Id.* at 29222, 29231.

60 Hill Statement; *see also* Bowman Speech (criticizing this aspect of the FDIC's proposal as potentially "frustrat[ing] banks' ability … to manage their businesses going forward").

61 Bowman Speech ("[Regulators] should acknowledge that [a bank's] plans may change over time as conditions evolve. A bank's future activities, whether banking or branching, are subject to regulatory

year, affirmative commitments against which the resultant institution will be evaluated.[62] As Federal Reserve Governor Bowman observed in response to the policy statement, regulators should not "engage in 'regulation by application'" in this manner.[63] Instead, as is the current practice and as Governor Bowman advocated, regulators "should acknowledge that [banks'] plans may"—indeed, *should*—"change over time as conditions evolve."[64] Accordingly, the FDIC should not force banks to hardwire plans with respect to branch actions and thus avoid limiting banks' flexibility to adjust their business and operations to address changing circumstances, which is key to banks' ability to ensure safety and soundness.

3. Hearings

Under the terms of the policy statement, the FDIC may hold a hearing to consider merger applications and "generally expects" to hold such a hearing when the resulting IDI will have greater than $50 billion in assets or for which a "significant number of [Community Reinvestment Act] protests are received."

The general expectation regarding public hearings is problematic for two reasons. First, the mere fact that a transaction would result in an IDI of greater than $50 billion in assets is not, in and of itself, a reason to hold a hearing and thereby unduly delay the timing of an action on an application.[65] There is no reason an application cannot be decided on the basis of a written record, as it most always has been in the past. In addition, this type of statement seems to be based on the inaccurate predisposition that transactions involving larger institutions (which, at $50 billion in assets, would account for less than one quarter of 1% of total U.S. banking assets) are inherently undesirable, which is bad policy.[66] As explained more in Section I.B.iii, a categorical bias against transactions involving large IDIs is a misguided regulatory approach and is inconsistent with the Congressional mandate that the federal banking agencies evaluate transactions on a case-by-case basis.

Second, the FDIC does not define what a "significant" number of "CRA protests" means, and even more importantly does not limit the CRA protests to those that are substantive

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requirements, and oversight through ongoing supervision activities. We need not operate like the applications process is the only tool available to address policy concerns."); Hill Statement ("[T]here may be examples of mergers in which (1) the merger would benefit the convenience and needs of the community to be served but (2) the applicants are unable to prove that *ex ante* to the satisfaction of the FDIC."). Further, merger parties may not be able to obtain the relevant information due to gun-jumping and related antitrust restrictions. *See generally* AM. BAR ASS'N, *Premerger Coordination: The Emerging Law of Gun Jumping and Information Exchange* (2006).

[62] 89 Fed. Reg. 29222, 29242.

[63] Bowman Speech.

[64] 89 Fed. Reg. 29222, 29242.

[65] Indeed, extending this position in the policy statement to its logical conclusion would suggest that any IDI with more than $50 billion in assets would be expected to undergo a public hearing on *any* BMA application, including for a mere internal reorganization, regardless of the limited public interest in such transactions. Such an outcome would not only be absurd but also a wasteful use of the FDIC's resources and could not be what the FDIC intended with this statement.

[66] As of April 26, 2024, the aggregate total assets held by U.S. banks was approximately $23,207 billion. *Total Assets, All Commercial Banks*, Federal Reserve Economic Data (last updated Apr. 26, 2024), https://fred.stlouisfed.org/series/TLAACBW027SBOG.

and well founded. We are concerned that including this type of consideration in any re-proposed policy statement could invite certain actors to file multiple, "carbon copy" CRA-related comments simply to delay a transaction or otherwise in bad faith.[67] To avoid abuse of the public comment process and unnecessary prolonging of the application process, the FDIC should make clear in any re-proposed policy statement that CRA protests that are unsubstantiated from factual or legal perspectives (including, for example, form protests) will not be considered in determining whether a public hearing will be held.

ii. Competition[68]

In the proposal, the FDIC instructs that it "will generally require" divestitures to be completed before permitting the consummation of a transaction to mitigate competitive concerns.[69] This marks a shift in current practice, as the federal banking agencies, Department of Justice and Federal Trade Commission typically permit divestitures within a reasonable time after a transaction's closing to enable a closing to occur promptly and accommodate the unpredictable and dynamic nature of the market.[70] It is also worth noting that the DOJ and the banking agencies have, over many years, developed safeguards to ensure that divestitures prevent a merger from having anticompetitive effects.[71]

This proposed change in divestiture practice appears to be based on a faulty premise.[72] Specifically, in commenting on this aspect of the policy statement, CFPB Director and FDIC Board member Rohit Chopra asserted that when merging parties divest assets post-transaction, they have "plenty of time … to sabotage their future competitor[s]."[73] We are aware of no evidence to this effect, nor did the FDIC provide any evidence for this reasoning in the policy statement.

Furthermore, this is another area where there are inconsistent agency views. The DOJ and FTC in their 2023 merger guidelines do not include a requirement regarding pre-closing completion of divestitures, and the OCC NPR also does not include any similar indicator or other

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67 BPI has made similar observations regarding the OCC NPR. *See* BPI OCC Comment Letter at 17-18 (criticizing the OCC NPR for a similar absence of qualification with respect to public commentary).

68 The discussion in this part is generally relevant to Section III of the policy statement (Statutory Factors—Monopolisitic or Anticompetitive Effects) and Questions 6 and 7 in the Supplementary Information.

69 89 Fed. Reg. 29222, 29227, 29241.

70 As a general matter, we submit that the federal banking agencies' current approach to addressing competitive effects in the U.S. banking system has yielded a banking industry that is both less concentrated than other economies and that has experienced unchanged concentration levels in local banking markets across the country for several decades. *See generally* 2022 Comment Letter (summarizing evidence).

71 *See generally* Am. Bar Ass'n, *Bank Mergers and Acquisitions Handbook* at 73–85 (2006).

72 *Cf.* Hill Statement ("[F]ailing to successfully divest post-merger is extremely rare, and the FDIC has other supervisory tools to address such a concern.").

73 Press Release, Prepared Remarks of CFPB Director Rohit Chopra at the Peterson Institute for International Economics Event on Revitalizing Bank Merger Review, CFPB (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/ (the "Chopra Remarks").

requirement.[74] Additionally, this pre-closing divestiture requirement would add significant delay and complexity to an already lengthy and costly merger process.[75] Forcing merger parties to plan for and coordinate the closing of the overarching merger transaction and the completion of divestitures largely at the same time, which may involve orchestrating numerous systems conversions, asset transfers and similar time-intensive actions on overlapping timeframes, would put a significant strain on management and other internal resources that could result in adverse consequences and unnecessary disruption for customers, with no discernible—or articulated and supported—benefit to the financial system. Therefore, the FDIC should remove this pre-closing divestiture requirement from any re-proposed policy statement.

iii. Financial Stability[76]

The proposal indicates that transactions that result in a "large" IDI, defined as those with greater than $100 billion in assets, "will be subject to added scrutiny."[77] Although the statement that transactions involving large banks will result in added scrutiny is unremarkable on its own, we are concerned by what appears to be the intent behind it. Director Chopra made this intention clear in his remarks about the policy statement: "By codifying this [$100 billion threshold], boards of directors and management at large firms can understand that the likelihood of megamergers will be low."[78] As a result, and directly contrary to the statute and precedent of all three agencies, 29 banks would be precluded from any acquisitions and another eight banks would be precluded from significant acquisitions. In other words, a bank that holds $100 billion or less in assets—less than one-half of 1% of the nation's banking assets—would not be permitted to grow by acquisition.[79]

Such a categorical ban, or even regulatory discouragement, on bank merger transactions involving large banks is not supported by the BMA (or any other banking law) and would exceed the scope of the FDIC's statutory authority. The BMA specifies the types of merger transactions that shall not be approved.[80] In addition, the size limit imposed by Congress

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74 *See* Merger Guidelines, U.S. Dep't of Justice & the FTC (Dec. 18, 2023), https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf; *see also* OCC NPR at 10013 (saying only that conditions on approval of a transaction may include asset divestitures).

75 *Accord* Hill Statement.

76 The discussion in this part is generally relevant to Section III of the policy statement (Statutory Factors—Risk to the Stability of the United States Banking or Financial System) and Questions 30, 31, 32 and 35 in the Supplementary Information.

77 89 Fed. Reg. 29222, 29243.

78 Chopra Remarks.

79 *See supra* note 66.

80 18 U.S.C. § 1828(c)(5) provides:

The responsible agency shall not approve—

> (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

on mergers—10 percent of national deposits or liabilities[81]—is approximately 20 times the size of a $100 billion-asset bank.[82] Yet the FDIC seems to be creating, at the very least, a strong presumption against approving bank merger transactions involving IDIs that hold well below 1% of the nation's banking assets, which may preclude these institutions from gaining scale to compete more effectively. There is no presumption to this effect in the BMA because Congress did not believe that this was the right result for the American banking system, bank customers or the U.S. economy. We also share the opinion that one of the lessons from the 2023 bank failures was that, if FDIC receiverships were avoidable because a buyer had the capacity to acquire a failing bank, that "would have been an unequivocal positive for financial stability."[83] Although we do not believe that it is the FDIC's intent to discourage or hinder such transactions, we are concerned that this would be the practical effect of the policy statement.[84]

Reinforcing this concern, and even ignoring Director Chopra's suggestion that "additional scrutiny" is synonymous with preclusion, the FDIC does not explain what this "additional scrutiny" will entail. Without this guidance, applicants for these types of transactions may struggle to prepare satisfactory applications or, indeed, avoid pursuing beneficial transactions altogether merely because of this arbitrary and extra-statutory size-based threshold. That is an undifferentiating, sweeping regulatory response to a nuanced, dynamic and complex banking system; that approach is particularly troubling when the BMA statutory factors require precise and fact-intensive analysis by reviewing agencies. The FDIC should abandon this approach that is "biased in favor of one class of bank over others," and reissue a revised policy statement that "allows banks of all sizes and various business models to flourish."[85]

One way to enhance the precision of the FDIC's evaluation of the effect of a proposed transaction involving large IDIs on U.S. financial stability would be for the agency to leverage the same quantitative, indicator-based risk score methodology that the Federal Reserve has developed in connection with its GSIB surcharge framework.[86] The FDIC could leverage the

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> 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.[]

81 Pub. L. No. 103-328, 108 Stat. 2338, 2339 (1994) (concentration limit provision of the Riegle-Neal Interstate Banking and Branching Efficiency Act establishing a cap of 10 percent of the total amount of deposits of IDIs in the United States); *see also* Pub. L. No. 111-203, § 622(b), 124 Stat. 1376, 1601, 1633 (2010) (concentration limit provision of the Dodd-Frank Act establishing a 10 percent cap on total consolidated liabilities of any one institution in relation to all banking liabilities).

82 FDIC, 2022 Summary of Deposits at 46 (Sept. 22, 2023) (stating that as of June 2022, the national deposit was $18.1 trillion), https://www.fdic.gov/analysis/quarterly-banking-profile/fdic-quarterly/2023-vol17-1/article1.pdf.

83 Hill Statement.

84 *Cf.* McKernan Statement (observing that "[t]he proposal could be read to preclude a merger in which a stronger bank rescues a troubled bank").

85 Hill Statement; *see also* McKernan Statement (criticizing the proposal as displaying a general bias against bank mergers). Evidence of this bias against bank mergers can be found in Director Chopra's remarks about the policy statement. *See* Chopra Remarks (criticizing "the harms from the permissive, pro-merger policy posture of recent decades" and distinguishing that approach from the policy statement).

86 Regulatory Capital Rules: Implementation of Risk-Based Capital Surcharges for Global Systemically Important Bank Holding Companies, 80 Fed. Reg. 49082 (Aug. 14, 2015), https://financialresearch.gov/bank-systemic-risk-monitor/. *See also* Baer, Greg, Bill Nelson and Paige

quarterly systemic risk data that firms with greater than $100 billion in total U.S. assets are required to file on Form FR Y-15 to analyze those aspects of a resulting firm's operations that are likely to generate negative externalities in the case of its failure. In addition to being consistent with the Federal Reserve's well-established approach to evaluating the financial stability statutory factor,[87] the benefit of the FDIC's adoption of this existing methodology is that the agency could implement it without delay or attempts to invent its own separate "quantitative risk indicator for overall financial stability." Leveraging the framework used by the Federal Reserve to evaluate systemic risk would also underscore the importance of relying on empirical evidence and data driven-analysis when making policy determinations about mergers involving large banks, rather than unverified assumptions or arbitrary size thresholds, as our analysis demonstrates that certain mergers involving even the largest banks can reduce systemic risk.[88]

C. *Comments on Other Process-Related Matters*

Throughout the policy statement, the FDIC injects several key changes related to the bank merger transaction review process that would increase costs and further extend the FDIC's processing times with limited benefits. Certain of these changes also depart from historical and peer regulator practice without furthering a coherent policy goal. Our specific objections and recommendations follow.

i. Use of Non-Standard Conditions[89]

The FDIC indicates in the policy statement that it will not use non-standard conditions as a means for favorably resolving any statutory factors that otherwise present material concerns.[90]

Apart from directly contravening Section III of the policy statement where the FDIC states that "[n]on-standard conditions may be imposed, as appropriate, in response to CRA weaknesses, relevant regulator input, bank commitments, or public comments,"[91] the FDIC's position on this issue also is not consistent with that of the Federal Reserve or the OCC. For

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Paridon, *Financial Stability Considerations for Bank Merger Analysis* (May 16, 2022), https://bpi.com/wp-content/uploads/2022/05/Financial-Stability-Considerations-for-Bank-Merger-Analysis.pdf.

87 The GSIB capital surcharge methodology is the only codified measure of the systemic risk presented by a firm in Federal regulation. The Federal Reserve has explicitly adopted this methodology for assessing mergers in certain cases. Furthermore, the metrics it has used in assessing financial stability risk in other cases coincide with the components of the GSIB surcharge, and the GSIB surcharge is the only rule that provides metrics for those risks. That said, it significantly overstates systemic risk, and further assessment in the merger context would need to correct for this bias.

88 Our analysis based on the GSIB surcharge framework's Method 2 scores challenges the presumption that any merger involving a GSIB would necessarily increase systemic risk. Instead, it suggests that the specific characteristics of the merging entities, particularly the target bank's funding profile, play a crucial role in determining the net impact on financial stability. The FDIC does not present any data or analysis to suggest otherwise. Francisco Covas, Sarah Flowers and Benjamin Gross, *Mergers Involving GSIBs Do Not Inherently Increase Financial Stability Risk* (May 16, 2024), https://bpi.com/mergers-involving-gsibs-do-not-inherently-increase-financial-stability-risk/.

89 The discussion in this part is generally relevant to the discussion of Merger Application Adjudication in Section II of the policy statement (Jurisdiction and Scope).

90 *Id.* at 29239, 292226.

91 *Id.* at 29242.

example, the Federal Reserve has stated that a non-standard condition (*e.g.*, a branch opening in a low- or moderate-income or minority census tract) may help address a less-than-satisfactory CRA rating that would otherwise be an impediment to the Federal Reserve's favorable resolution of the convenience and needs statutory factor.[92] Likewise, the OCC's NPR acknowledged that, "consistent with current OCC practice," the OCC's review of a transaction may result in an approval subject to certain conditions, such as minimum capital requirements.[93] Furthermore, Acting Comptroller Michael J. Hsu (also a director on the FDIC Board) commented that, although he supports the policy statement's assertion on the use of non-standard conditions, "[a]t the same time, in some instances targeted conditions can mitigate specific risks from a proposed merger transaction. These should be considered when they will be effective and where appropriate."[94]

This interagency inconsistency is confusing for banks assessing their strategic consolidation options. We strongly encourage the FDIC to coordinate with its peer banking agencies to provide consistent and clear guidance to the industry. As proposed, the policy statement risks delaying or even preventing transactions that could have a positive and stabilizing impact on both the proposing institutions and the broader U.S. economy. Indeed, we share Director Hill's perplexed reaction to this position: "why would the FDIC reject efforts by applicants to address or mitigate concerns that arise during the [bank merger review] process?"[95]

ii. Public Statements Regarding Withdrawals[96]

In a marked departure from current practice, under the proposed policy statement the FDIC would in certain cases publicize applicant withdrawals. Specifically, if an applicant decides to withdraw its application, the FDIC may permit the applicant to do so, but it may in turn issue a public statement disclosing its concerns with the withdrawn application if "such a statement is considered to be in the public interest for purposes of creating transparency for the public and future applicants."[97]

We believe that any enhanced transparency that would be provided by the FDIC's public commentary on a withdrawn application[98] will not outweigh the damage to the parties involved or the dampening effect that this position could have on other parties' willingness to

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[92] Federal Reserve, SR 14-2/CA 14-1: Enhancing Transparency in the Federal Reserve's Application Process (Feb. 24, 2014), https://www.federalreserve.gov/supervisionreg/srletters/sr1402.htm.

[93] Business Combinations Under the Bank Merger Act, 89 Fed. Reg. 10010 (Feb. 13, 2024), https://www.occ.gov/news-issuances/federal-register/2024/89fr10010.pdf; *see also id.* at 10016 (suggesting that concerns regarding an application can be "addressed or remediated").

[94] OCC Press Release, *Acting Comptroller Issues Statement on the FDIC's Proposed Statement of Policy on Bank Merger Transactions* (Mar. 21, 2024), https://www.occ.treas.gov/news-issuances/news-releases/2024/nr-occ-2024-31.html.

[95] Hill Statement.

[96] The discussion in this part is generally responsive to the discussion in Section II of the policy statement (Jurisdiction and Scope—Merger Application Adjudication).

[97] *Id.* at 29240.

[98] The decision to withdraw an application may stem from a range of reasons. *See, e.g.*, Bowman Speech (commenting that withdrawals may occur due to, among other things, "prolonged uncertainty due to regulatory delays, expiration of contractual deadlines, and issues that are uncovered only during the processing of the application").

undertake transactions. Publication of the FDIC's concerns with an application may subject applicants to unnecessary reputational damage.[99] We also share Federal Reserve Governor Bowman's concern that "this approach could evolve to become the expectation for *all* withdrawn applications, and, if so, could put regulators in the untenable position of needing to disclose confidential supervisory information or nonpublic business information about applicants even in the case of a withdrawn application."[100] Such a disclosure of confidential supervisory information or nonpublic business information may negatively impact customer, employee and business relationships, thereby jeopardizing the safety and soundness of the relevant banks. Furthermore, as is currently the case, if the FDIC wanted to address a concern it believed was in the public interest for purposes of transparency, it could do so through a general public statement that is not tied to a particular applicant or transaction. Such an approach would avoid the *in terrorem* effect created by the risk of an adverse public statement on a withdrawn application. Therefore, we strongly recommend that the FDIC eliminate this aspect of the proposed policy statement.

iii. Absence of Guidance on Timing[101]

Notably absent from the policy statement is any indication of how the FDIC intends to improve the lengthy timeline of merger application review, especially considering the enhanced informational requirements under the policy statement. Indeed, we submit that the policy statement threatens to make an already overly long,[102] expensive and ill-defined merger process even lengthier and more costly.[103] The FDIC does not describe how the agency will adapt to these changes, or even if it can.[104]

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[99] *Accord* Hill Statement ("I appreciate the desire to provide more transparency to the public regarding why certain mergers do not get approved, but believe any efforts to do so should avoid imposing reputational damage on applicants."). Relatedly, Governor Bowman also recently criticized the "misconception" that the lack of application denials suggests that the transaction standards are not rigorous enough. She remarked that this position "ignores the reality of the filing process:" because "transactions require significant upfront and ongoing investment and commitment of resources," banks "do not make the decision to file an application lightly." Bowman Speech.

[100] *Id.* (emphasis in original).

[101] The discussion in this part is generally responsive to Question 1 in the Supplementary Information.

[102] Hill Statement ("[The FDIC's process] takes far too long, with too many hurdles, and is too unpredictable.").

[103] *Accord id.* ("The proposed [policy statement] … moves in the wrong direction, potentially making the [bank merger application] process longer, more difficult, and less predictable."); *accord* Merger Policies of the Federal Banking Agencies, House Fin. Servs. Comm. (May 1, 2024) (Statement of Chairman Andy Barr), https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=409239 ([T]he FDIC … want[s] to make mergers all the more difficult, injecting sluggishness into their processes even for mergers that clearly meet the approval criteria under the Bank Merger Act."); *see also* Bowman Speech ("Reducing the efficiency of bank M&A can be a deterrent to healthy bank transactions—it can reduce the effectiveness of M&A activity that preserves the presence of community banks in underserved areas, prevent institutions from pursuing prudent growth strategies, and actually undermine competition by preventing firms from growing to a larger scale, effectively creating a 'protected class' of larger institutions.").

[104] *See* Bowman Speech (criticizing regulatory delays in reviewing mergers and observing that they "can significantly harm both the acquiring institution and the target, causing greater operational risk"); *see also* Hill Statement (similar).

There is a chorus of expert voices about the dangers of delays in bank merger transaction review. For example, Governor Bowman recently remarked that a protracted review process for bank mergers "can significantly harm both the acquiring institution and the target, causing greater operational risk (including the risk of a failed merger), increased expenses, reputational risk, and staff attrition in the face of prolonged uncertainty."[105] That is particularly the case "[i]f the target institution is in a vulnerable state,"[106] a dynamic to which the FDIC should be acutely attuned.[107]

Furthermore, there are other more complex follow-on effects from these kinds of delays, which the policy statement threatens to exacerbate. As Governor Bowman has warned, uncertainty in bank merger regulation may deter the creation of new banks, "as potential bank founders stay on the sidelines knowing that future exit strategies—like the strategic acquisition of a de novo bank by a larger peer—may face long odds of success."[108] The introduction of new institutions is integral to "a fair, open, and competitive marketplace";[109] the FDIC cannot ignore the effects that its proposal may have on that part of the market.

As we observed in our comment letter in response to the OCC NPR,[110] the complete lack of predictability of the review process is already a significant problem. There is no information provided regarding the number of rounds of staff review of an application, the dynamic between regional and Board staffs, the amount of subsequent questions, or any estimated amount of time in which an application will be acted upon. Yet expectation-setting around timing is integral not only for transaction certainty and planning but also for the health of the banks involved: once a signing is public, the target (and sometimes the acquirer) may struggle to retain customers, vendors, staff and other stakeholders.[111] Furthermore, extensions caused by delays in review can impose tangible costs on the applicant's operations. This concern is particularly acute where the target is already a fragile institution or where mass departures could limit the target's operational and compliance capabilities and undermine its financial integrity.

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105 Bowman Speech.

106 Hill Statement.

107 *See also* McKernan Statement (criticizing the policy statement for failing to consider the "ways in which a merger could decrease risk to financial stability").

108 Bowman Speech.

109 89 Fed. Reg. 29222; *see also id.* (describing that on July 9, 2021, President Biden signed the Executive Order No. 14036 that, among other things, "addressed the impact that consolidation may have on maintaining a fair, open and competitive marketplace").

110 *See generally* Section I.E of the BPI OCC Comment Letter.

111 *See also* Federal Reserve Governor Bowman, *Reflections on the Economy and Bank Regulation*, Florida Bankers Association Leadership Luncheon (Feb. 27, 2024), https://www.federalreserve.gov/newsevents/speech/bowman20240227a.htm (stating that she "remain[s] concerned about delays in average processing times and that subsequent regulatory actions could lead to further delays" and that "there has been little discussion or recognition of how the regulatory process can be enhanced to improve the speed and timeliness of regulatory decision-making on these applications" when "[a]s all bankers know, application processing delays can be quite harmful, resulting in greater operational risk, increased expenses due in part to contract delays, reputational risk, and staff attrition due to the prolonged uncertainty. In the broader context, reducing the efficiency of bank mergers and acquisitions may also act as a deterrent to a healthy evolution of the banking system.").

Although the FDIC's Bank Applications Procedures Manual's section on mergers states that the agency expects most applications to be decided within "60 days from receipt of a substantially complete application,"[112] in the last five years, the average number of days it took the FDIC to review and approve a BMA application involving combined assets greater than $100 billion was approximately 175 (or approximately three times the 60-day target time). Even in the case of business combinations involving resulting institutions with combined assets of between $25 billion to $50 billion during the same time period, in several instances the review period was more than five times the 60-day target time.[113]

We recommend that any future FDIC action incorporate clear timing parameters for the staff's application review process. For example, as we suggested in our comments to the OCC NPR,[114] the FDIC should consider issuing guidance that, except in extraordinary circumstances, applicants should expect no more than two rounds of questions, one within 60 days of the filing of an application and another within 30 days of the submission of a response to the first request. In addition, the FDIC should commit that it will not delay processing of an application if comments on an application by state or other agencies are not submitted within 30 days of the publication of the application, which is the time period applicable under the BMA to DOJ reports requested by the FDIC.[115] This would mitigate unnecessary delays caused by factors outside of an applicant's control.

The further guidance discussed here is critical, separate and apart from this proposed policy statement. Thus, we strongly recommend that the FDIC address this issue regardless of any future action regarding the proposed policy statement. Specifically, this additional guidance could be issued through other means, including through an update to the FDIC's Bank Applications Procedures Manual.

II. Further Revisions to the FDIC's Supplement to the Interagency Bank Merger Act Application Form Are Needed to Align with Customary Industry Practice and Available Data

The FDIC requested comments on its proposed revision of the FDIC Supplement to the Interagency Bank Merger Act Application Form (Supplement).[116] We recognize that these revisions appear aimed at generally aligning the FDIC's review of competition-related information with the approach used by the DOJ and FTC. For example, Section I.A through C of the revised supplement outlines a more open-ended "geographic market" definition similar to the

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112 FDIC Mergers Manual, at 4-23.

113 For example, the application for the merger of Troy Bank & Trust Company and the First National Bank of Brundidge was submitted on March 26, 2018 and approved on December 10, 2019, for a total review time of 624 days. The application for the merger of Provident Bank and Lakeland Bank was submitted on November 1, 2022 and approved on March 21, 2024. Similarly, the application for the merger of Lone Star State Bank of West Texas with and into Prosperity Bank was submitted on November 16, 2022 and was approved on March 14, 2024.

114 BPI OCC Comment Letter at 19-20.

115 *See* 12 U.S.C. § 1828(c)(4)(B).

116 *See* 89 Fed. Reg. 29245, 29245; *see also* Redline, Supplement to Interagency Bank Merger Act Application, FDIC (2024), https://www.fdic.gov/resources/regulations/federal-register-publications/2024/2024-bank-merger-act-supplement-redline.pdf.

one used by the DOJ (and the Federal Reserve in certain cases),[117] and Section III of the supplement largely tracks the FTC's proposed updates to the Hart-Scott-Rodino form regarding the type of surveys, reports and analyses that applicants must provide.[118]

Although a number of the items in the proposed supplement capture information that parties routinely provide today to the DOJ, the FTC and Federal Reserve, we believe that certain revisions will make the supplement more challenging to complete and will result in less accurate data collection. Specifically, we are concerned that applicants will struggle to provide the granular loan and deposit information requested in items 6 (total dollar volume of deposits according to recorded depositor addresses), 7 (total number of loans according to recorded borrower addresses) and 8 (total dollar volume of loans according to recorded borrower addresses) for each relevant geographic market because producing this information would require a degree of coordination between an acquirer and a target that is atypical as part of customary diligence. Accordingly, we recommend that the FDIC remove these items from the final supplement.

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[117] DOJ, *How do the Federal Reserve and the U.S. Department of Justice, Antitrust Division, analyze the competitive effects of mergers and acquisitions under the Bank Holding Company Act, the Bank Merger Act and the Home Owners' Loan Act?*, FAQs 6–7, https://www.justice.gov/atr/page/file/1232171/dl?inline.

[118] Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42178 (June 29, 2023) (proposing similar text to that included in the FDIC Supplement, specifically that applicants must "[p]rovide all studies, surveys, analyses, and reports prepared by or for any officer(s), director(s), or supervisory deal team lead(s) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth, or expansion into product or geographic markets").

Conclusion

For the reasons discussed above, we believe that the FDIC's proposal has fundamental legal and substantive flaws and should be withdrawn. However, to the extent the FDIC determines to take any final action with respect to the proposal, the FDIC should:

- Substantially revise the policy statement so that it is consistent with statutory standards and sound bank merger policy, including by avoiding novel, artificial or arbitrary constraints or obstacles;
- Provide concrete information on the ways in which the FDIC plans to address the current delays in processing times separate and apart from the policy statement, including by adopting guidance consistent with our proposals for limited rounds of review and consistent timeframes for reviews by other agencies; and
- Eliminate the problematic loan and deposit market share requests included in the supplement.

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We appreciate the opportunity to comment on the proposal. If you have any questions, please contact the undersigned by email at [redacted]

Respectfully submitted,

[redacted]

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