International Bancshares Corporation

June 14, 2024

Via email: Comments@fdic.gov

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

Re: Comments of International Bancshares Corporation on Proposed Statements of Policy on Bank Merger Transactions (RIN 3064-ZA31).

Dear Mr. Sheesley:

The following comments are submitted by International Bancshares Corporation ("IBC"), a publicly traded, multi-bank financial holding company headquartered in Laredo, Texas. IBC maintains 166 facilities and 256 ATMs, serving 75 communities in Texas and Oklahoma through five separately state-chartered banks ("IBC Banks") ranging in size from approximately $470 million to $8.9 billion, with consolidated assets totaling over $15 billion. IBC is one of the largest independent commercial bank holding companies headquartered in Texas. The Federal Deposit Insurance Corporation ("FDIC") is the primary federal regulator of the IBC Banks, and the Federal Reserve Board ("FRB") is the primary federal regulator of IBC.

These comments respond to FDIC's proposed statement of policy ("Statement") regarding transactions subject to the Bank Merger Act ("Act"). IBC agrees that a review and revision of the regulations and guidelines for assessing applications under the Act is necessary and critical to the continued growth and health of the US financial system. A significant number of the applicable regulations and policies are at least 25 years old, and the financial services industry has undergone significant changes in that time. To wit, the ubiquity of online banking, the interstate expansion of bank branch and online banking networks, the growth of market access made possible by advertising and communication innovations, and the increased market presence of nonbank financial firms, including "fintechs," has resulted in a more connected and expanded financial system that allows what were once regional fiefdoms to expand across the nation. While this interconnectedness and breadth of geographic coverage is not bad in and of itself, it absolutely requires regulators to re-think and revise the tools available for analyzing and approving bank merger applications in order to continue safe and sound operations and banking and financial services accessibility for low-to-moderate income consumers.

Because the regulators have failed to consider and address these significant changes in the financial services market in their applicable bank merger review and approval processes, the current bank merger assessment guidelines of FDIC, the Board of

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Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the United States Department of Justice ("DOJ") fail to take into account significant competition in many product lines, which is especially detrimental in underserved and rural markets.

IBC has several objections to the Statement, including the following:

- FDIC must modernize its assessment criteria and process for the competitive effects analysis: FDIC must modernize and broaden the assessment of competitive effects to take into account nonbank lenders and financial service providers, as well as online competition from banks lacking a physical presence in local markets. Given the ubiquity of the internet and online banking tools, banks have all kinds of competition that should be considered as part of this analysis – from fintechs, money transmitters, and payday, title, and other nonbank lenders. In today's financial services market, banks only represent a small piece of the competitive landscape.

- FDIC should re-evaluate the Statement's requirement that the resulting institution be a financially stronger institution so that strong banks are not prohibited from acquiring weaker institutions in periods of financial market distress.

- FDIC must clearly define the financial stability analysis: FDIC should clearly define the financial stability analysis for bank mergers and avoid reliance on imprecise measures like asset size alone.

- The proposed revisions to the convenience and needs factor is antithetical to economic analysis and highly subjective: The requirement for merger applicants to demonstrate increased benefits to community convenience and needs compared to the pre-merger situation is subjective and lacks evidence of supporting congressional intent. In any event, this analysis should also include consideration of available competition in the market area.

- FDIC should not release substantive public statements on application withdrawals: FDIC should not issue detailed public statements on merger application withdrawals. Instead, FDIC should continue with its current policy of disclosing only that the application was withdrawn without elaborating on underlying issues.

- FDIC should not require pre-merger divestiture: Requiring divestitures before finalizing mergers could significantly delay completion of transactions, causing unnecessary uncertainty for customers and employees.

- FDIC should confirm the confidentiality of supporting materials: FDIC should confirm that detailed, nonpublic information provided in merger applications will remain confidential, as the Statement would require even more of such information and public disclosure of sensitive information could damage banks while mergers are pending and thereafter.

- FDIC review of transactions between insured depository institutions ("IDIs") and non-insured entities should be limited: Routine transactions, such as transfers of health savings account custodial functions, should not be subject to FDIC review under the BMA, and FDIC should facilitate these transactions without formal merger applications, similar to practices by OCC and the Federal Reserve.

- FDIC should comprehensively review the implications of merger transactions involving banks and credit unions: FDIC should scrutinize credit union-bank mergers more closely due to their increasing prevalence, potential competitive impacts, and the lack of transparency and regulatory oversight that may disadvantage consumers and communities.

IBC appreciates the opportunity to comment on these proposed revisions.

Comments

1. The assessment of competitive effects needs to be revised, modernized, and broadened to include an evaluation of all available products and services, including nonbank lenders, as well as online competition from banks lacking a physical presence in local markets.

As an initial matter, any discussion or analysis of competition in the banking industry must start with the stark fact that new bank charters have declined precipitously since the crisis of 2008. Between 1995 and 2008, there were never less than 90 new bank charters issued in any given year, with four of those years seeing more than 165 new bank charters granted and over 250 charters granted in 1999.[1] In contrast, between 2010 and 2016, seven new charters were issued *in total*. 2022 saw 14 charters granted, with nine charters granted in 2023. Given these trends and the current regulatory environment surrounding bank charters, IBC does not expect these numbers to return to pre-2008 levels ever again. Simply put: new banks are not popping up like they used to and the field has been frozen in ice outside of merger activity. When considering competition, it is important to acknowledge the reality of the industry – competition simply is not coming in the form of new market entrants. Thus, the alternative to a merger is not a new bank fostering competition. More likely than not, a bank merger application denial will simply result in less competition as the non-acquired institution ceases operations or is placed into receivership. This is not to say competition is stagnant or even decreasing. Quite the opposite. More and more, nonbank entities are providing financial products and services and are making the market more competitive than ever. Presently, banks have a smaller and smaller role in the market due to the proliferation of nonbank financial service providers.

[1] CRS, *An Analysis of Bank Charters and Selected Policy Issues,* available at https://crsreports.congress.gov/product/pdf/R/R47014

The Statement provides that in reviewing merger applications FDIC will consider "all relevant market participants," which will include "any other financial service providers that FDIC views as competitive with the merging entities, including providers located outside the geographic market when it is evident that such providers materially influence the market." [Statement at 29240] However, the Statement goes on to provide that the traditional measure of deposit concentrations based on the presence of offices in geographic markets, as measured by the Herfindahl-Hirschman Index ("HHI"), will continue to be an important metric. It is unclear how these positions will be harmonized, and IBC is concerned that FDIC does not provide more clarity into how it will include non-banks' online-only products and services, and alternative financial providers' products, and services in its competitive effects analysis. Relying solely or in part on deposit concentrations to determine competitive effects is simply not appropriate in the modern banking landscape. This is due, in large part, to the inability to truly understand and quantify deposit concentrations because so much of the deposits and money in any community have been moved out to nonbank firms, such as Blackrock and others. Given the changes in and rise of novel financial services, money managers, and bookkeeping, local deposit base concentration is not only nearly impossible to calculate, but it also is an increasingly poor metric for measuring the competitive landscape. Financial products and services are rarely truly "local" anymore.

Defining and evaluating financial markets based solely or primarily on bank branch networks and deposit concentrations omits consideration of critical features of the markets that banks operate in and customer groups which they serve. Any market definition should consider these additional factors in assessing the relevant competitive environment:

- Online delivery of financial products and services by banks without a physical branch presence, as well as by online mortgage companies, nonbank commercial real estate lenders, and other online lending services;
- Money-market funds (which are direct competitors for bank deposits);
- Farm Credit System institutions, thrift institutions, and credit unions; and
- Fintechs and other nonbank firms, which frequently provide financial services traditionally provided by banks through physical branches.

The effect of online banking products and services, and their rise in popularity and use, cannot be overstated. It is now possible, and almost expected, that all banks provide access to online banking services throughout the entire customer lifecycle, including account opening, customer onboarding, and transaction services. Banks no longer need a physical branch presence to market to and serve any given geographic area. This has only widened the competitive gap between large institutions, which are able to use economies of scale and vastly superior resources to implement and operate online product and service offerings, and small and mid-sized banks that cannot swiftly and economically offer the same. This online competition is completely absent from the bank merger application analysis. Ignoring the practical landscape of the financial services market is harmful to both small and mid-sized institutions and consumers. The Statement

should be revised to include express consideration of these changes and the reality of the marketplace.

Moreover, banks and consumers continue to be harmed by rampant favoritism of credit unions. Credit unions enjoy preferential tax and regulatory treatment, and the evaluation of credit union mergers with banks is highly unfair when compared with the federal bank regulators' practices and analyses. Not only does this erode the tax base even further, but it increases the unfair advantage credit unions have over banks already by making their acquisition of banks an easier process than the reverse scenario or a bank acquiring another bank. Credit union competition should be given a multiplier when used as part of FDIC's competitive analysis.

In the lending space, the American Bankers Association ("ABA") recently found that nonbank lenders are increasingly gaining ground in competing with banks in all lending segments. Nonbank lenders underwrote 90 percent of all Federal Housing Administration ("FHA") mortgages in 2022.[2] Nonbanks have also considerably increased their market share in the overall mortgage origination space, increasing from just 19% in 2007 to 61% in 2022.[3] Furthermore, nonbank lenders provide the majority of US small business loans.[4] Fintech lenders have accounted for one-third of the total increase in nonbank loans since 2010.[5]

Finally, while private credit firms are direct competitors of banks in certain areas, they have significantly fewer regulatory requirements and less supervision than banks. Because they are not as regulated as banks, estimating the size of the private credit market is difficult to measure precisely, but recent estimates are as high as $3.14 trillion.[6] FDIC must recognize and consider the various nonbank competitors as part of their bank merger analysis in order to have a comprehensive and accurate view of the competitive landscape in which banks operate, especially given the current uneven regulatory landscape amongst lenders. These diverse financial institutions contribute to a highly competitive market environment, and a lack of consideration will only result in banks losing more ground to these nonbank lenders which could cause (or worsen an already existing) economic doom loop.

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[2] *Borrowers Turned to Nonbank Lenders for Mortgages*, BLOOMBERG (Dec. 18, 2023) https://www.bloomberg.com/graphics/2023-nonbank-lender-mortgage-loan-borrower-fee/#:~:text=Today%2C%20the%20biggest%20banks%20rarely,decade%20ago%20it%20was%2028%2C00.

[3] *More than mortgages: Hidden ways banks contribute to housing access,* American Bankers Association (February 9, 2024), available at https://bankingjournal.aba.com/2024/01/more-than-mortgages-hidden-ways-banks-contribute-to-housing-access/.

[4] Federal Deposit Insurance Corp., *The Rise of Finance Companies and FinTech Lenders in Small Business Lending* (2021), https://www.fdic.gov/analysis/cfr/bank-research-conference/annual-20th/papers/gopal-paper.pdf.

[5] *Id.*

[6] *Private credit is even larger than you think*, FINANCIAL TIMES, https://www.ft.com/content/bf3f3e70-e849-41db-9a29-f2e5ed988e97.

IBC is not asking FDIC to enter wholly unchartered waters by expanding the merger analysis of competitive effects to include the myriad nonbank participants. In some merger applications, banks have already used additional data to document such market penetration:

- Data gathered pursuant to the Home Mortgage Disclosure Act ("HMDA")[7] and the Community Reinvestment Act ("CRA")[8] can be used to show market activity conducted other than through branches, (as considered to some extent already in Federal Reserve geographic market definitions); and
- Evidence from traffic patterns can show customer use of services in wider areas.

FDIC should encourage the inclusion of this and similar relevant information in merger applications when appropriate to provide a more accurate picture of current market conditions.

2. FDIC should re-evaluate the Statement's requirement that the resulting institution be a financially stronger institution so that strong banks are not prohibited from acquiring weaker institutions in periods of financial market distress.

The Statement would require that the resulting institution of a merger transaction be *a financially stronger* financial institution. [Statement at 29229] IBC does not disagree that it is essential for FDIC to require that the resulting institution meets acceptable performance standards, including capital, asset quality, earnings, liquidity, and sensitivity to market risk. But to require that the merger result in a *stronger* institution will functionally prohibit strong banks from acquiring weaker ones during periods of economic distress. It also raises questions of how this requirement could affect FDIC's resolution of failed institutions if the acquisition of those institutions' assets would be subject to this or a similar requirement. Bank merger activity has been an important and essential tool used by the federal bank regulators during times of market distress and uncertainty in order to stabilize the banking system and reducing the number of bank failures. Acquisitions by strong banks of weaker ones can prevent failures and the need for FDIC resolution, while also protecting communities from the disruption of banking services that inevitably comes with the failure of a bank. Preventing bank failures also minimizes potential costs to the Deposit Insurance Fund, consistent with FDIC's statutory obligations. Having set out the clear financial standards that banks of all sizes and complexity must meet, bank merger candidates that meet the standards should expect to be approved, barring other competitive, or convenience and needs issues. FDIC should not require institutions to prove, using illusory hypotheticals and guesses, that the resulting institution will be a *stronger* financial institution then either institution was prior to the merger.

3. FDIC should clearly articulate what a financial stability analysis in the context of a bank merger would entail and what standards would apply. Detailed standards should be proposed for public review and comment.

[7] Codified at 12 USC § 2801 *et seq.*
[8] Codified at 12 USC §2901 *et seq.*

The Statement provides that in evaluating the financial stability factor of a bank merger application, FDIC would consider (1) size; (2) substitutability; (3) interconnectedness; (4) complexity; (5) cross-border activity; and (6) other elements impacting financial stability.

As part of the complexity prong, FDIC would consider the cost and operational efficiency with which it could resolve a resulting institution. Due to information gaps between institutions, it is unclear whether banks submitting merger applications would have sufficient information to complete an accurate resolvability analysis, but FDIC should not use imprecise assumptions based on an incomplete picture as measures of resolvability. For example, FDIC should not rely solely on bank asset size as its measure of resolvability. Though failed institutions of different sizes and business models may require different approaches to resolution, FDIC has a variety of experience and tools at its disposal in such situations. These tools offer options to preserve financial stability in a wide variety of failure scenarios. It is also concerning that FDIC has not provided a clear picture of how it analyzes financial stability and what banks can provide to satisfy this prong. Rather, FDIC is in the best position to know what it needs to analyze financial stability and resolvability because it is the regulator charged with managing and overseeing bank failures. Banks are more than happy to provide the information required to show adequate resolvability post-merger, but are not in the best position to know what is required to demonstrate such a position. FDIC should elaborate on exactly what resolvability standards apply so that banks can best tailor their merger application.

FDIC should also consider that many merger transactions are driven by the failure of the acquired institution to continue on as a going concern. If anything, merger transactions absolve FDIC of responsibility for resolving failed institutions because the failing institution is able to find an agreeable merger partner that is able to take on such responsibility. Mergers frequently "save" weaker banks and their operations without the need for formal resolution of a failed bank by providing increased capital, enhancing efficiency, and expanding the customer base. Mergers can also help by diversifying risk, bringing in additional management expertise, and boosting market confidence. This is absolutely a factor that should be considered as part of the financial stability analysis.

Moreover, applying imprecise assumptions (e.g., bank asset size) in the name of financial stability would likely have adverse implications on fostering competition. The Statement specifies that transactions resulting in institutions with total assets over $100 billion are more likely to present financial stability concerns and would be subject to heightened scrutiny. Yet such resulting institutions could represent competition for other large banking organizations that have already achieved significant growth, including by growing organically. Adding hurdles to mergers resulting in banks above $100 billion may ultimately weaken competition without a sufficient factual basis for doing so.

Finally, FDIC should consider the impact of nonbank competition on regulated depository institutions in the context of financial stability. Nonbanks enjoy a competitive advantage because they are not restrained from creating financial stability risks (as well as being free of many other regulatory burdens). Acknowledging the statutory requirement to consider implications of the financial stability of transactions subject to the Act, FDIC

should keep in mind the relatively greater potential impact of nonbank competitors on the financial stability landscape.

4. The "convenience and needs" factor should not impose an affirmative burden on applicants to demonstrate how the transaction will benefit the public when compared with the status quo ante.

Perhaps the most concerning part of the Statement is its inclusion of an unprecedented requirement that bank merger applicants demonstrate increased benefits to the convenience and needs of the applicable community(ies) as compared to the pre-merger status quo. This is patently inappropriate and grossly misunderstands the factual predicate of most, if not all, bank mergers. Bank mergers typically are driven by an institution staring down the barrel of failure or significant challenges to continue as a going concern seeking a merger partner in order to continue serving the needs of its community. By and large, the "status quo" FDIC seeks to compare post-merger benefits to simply will not continue to exist and thus should not be used as a snapshot pre-hoc comparison. The Statement fails to acknowledge that mergers are sometimes the best path for institutions to bear the burden and costs of increasing regulation and compliance and thus maintain banking services in their communities that would otherwise decline or disappear. Instead, FDIC should compare the merger benefits to what the market will look like with the acquired institution no longer operational and/or competitive, because that is the reality of most merger applications. Yes, in a perfect world where the acquired institution continues to operate as historical data trends support, it would make sense to compare post-hoc merger benefits to that status quo. But that simply ignores the facts driving the merger in the first place – namely, that an institution is unable to continue meeting the convenience and needs of its community if it continues to operate as-is. It is exceedingly rare for a merger transaction to be purely between two well-positioned and operating banks that simply seek to grow their market share and footprint. These transactions are primarily between one healthy and growing institution stepping in to acquire and "save" an institution that has determined it is no longer able to operate competitively in its market. Requiring a comparison to the status quo ante is inaccurate and ignorant of the nature of these merger transactions.

It is also not clear how this analysis of the market status quo ante can be measured through non-subjective and non-illusory means. The Statement simply demands that merger applicants demonstrate that the resulting institution will "better meet the convenience and needs of the community." [Statement at 29231] What will FDIC consider "better?" Is it better provision of existing/past products and services, such that new products and services will not be considered? Are banks beholden to the past needs and convenience of depositors, with no consideration of innovation and novelty that could be unlocked through a merger of resources? What possible objective definition does "better" have in the Statement? It is also unclear whether there is a legal basis for requiring a demonstration that there would be a net increase in convenience and needs satisfaction compared to the non-merger alternative. FDIC cites no evidence of Congressional intent to have such an affirmative burden placed on banks.

The Statement's focus on proposed branch closures fully fails to consider the numerous innovations in customer service channels banks have implemented in recent decades. The evolution of banking services delivery is highly relevant to banks' options for serving the convenience and needs of their customers and communities in the most cost-effective ways. While there are often tradeoffs between benefits, such as more in-person service and higher costs that are passed on to customers, that does not mean these factors merit no consideration in the bank merger analysis. Branches may not always be the most cost-effective way of serving customers in a particular market or of delivering certain products. Branches may also not be the most efficient way to meet the convenience and needs of communities, with online banking service availability being a huge boon to un- and underbanked communities that lack the ability to make use of branches during banking hours. Flexibility in addressing these questions as part of strategic merger planning and application evaluation will allow banks to optimize the delivery of products and services to customers while controlling costs.

When Congress sought to prevent specific types of transactions, such as those resulting in monopoly power, it enacted legislation specifically to address those transactions and concerns. For example, the Bank Holding Company Act of 1956 ("BHCA") was created to limit the growth of bank holding companies and prevent them from becoming monopolies by acquiring other banks. To ensure competition was not reduced, the BHCA required these companies to get approval from the Federal Reserve before acquiring additional banks.

Here, Congress has not mandated that a net increase in benefits to the convenience and needs of the community be a dispositive factor in evaluating and approving a merger application. If Congress had intended for this metric to be determinative, it would have made it explicit as it has done clearly in the past. The Act only requires banking regulators to "take into consideration... the convenience and needs of the community to be served."[9] This is not a mandate requiring an express showing of an increase in the meeting of convenience and needs of the community pro hoc ante, but rather a requirement that FDIC consider the potential benefits in these areas against the harm that merger rejection would cause. Under the plain language of the Act, the merging institutions do not have to prove that convenience and needs to the community will be increased. It is sufficient if the convenience and needs of the community are met or simply would be met better than if the merger was rejected. This can include maintaining the current level of service, as the institutions' CRA performance history and proposed future operations following closing of the merger can demonstrate.

5. FDIC should not issue a substantive public statement when an applicant withdraws its application.

The Statement provides that "if an applicant withdraws their filing, the FDIC 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

[9] 12 USC § 1828(c)(5)(B).

for the public and future applicants." [Statement at 29227] FDIC's current policy is to publicly disclose merger application withdrawals without explaining the reasons behind the withdrawal.

IBC believes this new practice will impose reputational damage on applicants and allow FDIC to engage in rank speculation on matters over which it is not authorized to opine. Public statements on withdrawals would also seem to defeat the purpose of allowing an institution to voluntarily withdraw without grounds. For example, a public statement citing FDIC supervisory concerns arising from the merger application could damage confidence in one or more of the applicable institutions, and would be inconsistent with FDIC's overall confidential treatment of supervisory information. Even if a withdrawal occurs for other reasons (e.g., delays in application processing and decisioning that impair the merger's business objectives, cause staff or customer uncertainties at the institutions, etc.), the difference in treatment of withdrawals could lead to damaging public speculation and even loss of confidence in the institutions. FDIC will not have sufficient insight into the underlying business details and market environment to opine on the exact cause of the application withdrawal. Even now, catastrophic delays in merger application decisions have resulted in a substantial number of application withdrawals. Will FDIC cite its own failures in expedient merger application decisioning in these public statements, or will it rely on speculative hypotheses about supervisory concerns being the cause of withdrawal? Will FDIC allow institutions to provide their specific reasons for withdrawing a merger application, and include that in the public statement without editorializing? Will FDIC allow institutions to make their own public statements about the merger application process and withdrawal without violating restrictions on confidential supervisory information? Changes to the current practice surrounding withdrawals present serious risks that outweigh any benefits to the institutions involved or to the public, will have a chilling effect on merger applications writ large, and will allow FDIC to speculate on sensitive confidential bank information and positions without allowing banks the same ability to correct the public record.

6. Requiring divestiture before the merger transaction will add significant delays to the incredibly lengthy process of merger application review and completion.

The Statement requires banks to complete divestitures prior to finalizing any merger. This condition to divest branches, and their associated deposits, and operating entities before completing the merger process will significantly prolong the transaction closure timeline and result in a further chilling of merger transactions. This would also prolong the period of uncertainty for bank customers and employees that merger transactions generally involve, without any offsetting benefits. Federal regulators have already brought the merger application decisioning process to a functional halt, and this requirement would further stifle merger activity to the point of obsolescence. This requirement is unnecessary, as instances of post-merger divestiture failures are exceptionally rare. Moreover, banks are rightfully hesitant of engaging in pre-merger divestiture given the uncertainty of approval federal regulators have introduced into the application review process. Why would an acquired institution divest of its business interests prior to approval and merger if the transaction could be denied by the regulators? Such

institutions are likely already floundering and should make every effort to maintain any capital they have until the merger is final. If the merger is not approved, the bank would have divested for no reason, and will be in an even worse position than it was before the merger application. It is also possible that an institution withdraws a merger application and eventually finds a merger partner with which no divestiture would be necessary. If required to divest pre-merger, again, the acquired institution would have given up valuable capital that could have assisted in its subsequent negotiations. Since FDIC possesses alternative supervisory mechanisms to address any concerns arising from divestiture issues, imposing this additional burden is wholly unnecessary and unjustified given the existing regulatory safeguards in place.

7. Any supporting materials acquired or requested in connection with the merger application should be kept confidential.

The Statement requires merger applicants to provide more detailed information as part of their applications than FDIC has required in the past, including surveys, studies, internal business reports analyzing competition and effects, and trend data. It is important that FDIC confirm that any information provided through the application process will remain confidential, especially considering its desire to make public statements regarding application withdrawals. Sensitive information provided to FDIC could be damaging to banks if revealed to the public while the merger is ongoing or afterwards. Information provided by a regulated to its regulator is typically granted the most protective confidentiality, and merger application information should be no different.

8. Transactions between an IDI and a non-insured entity should not require review under the Act when they are part of a routine sale of an asset or business.

FDIC's interpretation of the Act's scope is overly broad and would result in the misapplication of the Act to certain banking functions and services, including custodial relationships. The Statement indicates that Section 18(c)(1)(C) of the Act applies to the transfer of a custodial relationship to a nonbank if the transaction also involves a transfer of deposits to the nonbank or another entity. More specifically, the Statement provides that:

> Although parties seeking to engage in transferring customer accounts that consist of both custodial and deposit relationships may characterize the transaction solely as a transfer of custodial relationships, such transactions implicate the [Act] if they also result in a transfer of the deposit relationship. It has therefore been the view of the FDIC that the [Act] is implicated if an IDI transfers deposit relationships concurrent with, or subsequent to, a transfer of the custodial relationship. Accordingly, where customers have both a custodial and depository relationship with an IDI, an IDI may not evade the [Act] by transferring custodial rights to a third party that, in its newly acquired custodial capacity, causes the customer's depository relationship to be transferred either to itself or to another entity. This is true even if such transfer was ostensibly at the direction of a noninsured entity pursuant to custodial rights acquired from the IDI. [Statement at 29226]

This interpretation of the Act is overly broad and misapplies the Act to transactions in which a custodial relationship is purchased for cash and does not include the transfer or assumption of the deposits associated with the custodial relationship. The Act provides that without the prior approval of FDIC "no insured depository institution shall 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."[10] Based on its plain language, the Act only applies to transactions in which an asset is acquired in exchange for the assumption of deposits. But that simply is not how many transactions involving custodial relationships are structured. In the transfer of a custodial relationship, the right to act as the custodian of the custodial account (i.e., the "asset") is acquired for cash (i.e., the "consideration") and may not include the assumption of deposits by the acquiring entity.

This bifurcation of the assumption of assets and custodial powers is common in the transfer of custodial rights in connection with the custody of health savings accounts ("HSAs") from a bank to a nonbank custodian. In these transactions, the nonbank custodian pays the bank money for the assumption *of the right to act as custodian* of the HSAs. The nonbank does not assume or otherwise hold the HAS deposits. Only the right to act as custodian for the HSAs is acquired. After such right is acquired, each owner of an HSA has the right to object to the transfer of funds to the nonbank trustee or to direct that the funds be placed in one of the nonbank trustee's cash deployment options, including a bank deposit option, a nonbank annuity option, or nonbank investment option.

The Act was never intended to govern situations in which an individual owner of a deposit account decides to transfer his or her deposits to another institution. Moreover, the application of the Act in connection with the transfer of custodial services would impose a significant burden on account holders if a bank decides to cease offering such services, which has been a recent common trend for HSAs and related services. By applying the Act to the transfer of custodial powers, FDIC effectively eliminates the ability of many banks, especially community banks, to conduct a transfer of the custodial role without incurring excessive costs that may be borne by consumers. As a result, account holders are left on their own to find a new custodian when a bank exits the applicable line of business.

Prior rulings by FDIC and other federal bank regulators support the conclusion that the BMA does not apply to transactions in which a bank or nonbank assumes a relationship, such as a custodial relationship, but does not assume deposit liabilities in exchange for such relationship. IBC will not reiterate such prior rulings and support here, but such information can be found in the American Bankers Association comment letter submitted in response to the proposed Statement.

Based on the plain language of the Act and the substantial history of regulator agreement, the Act simply does not apply to the transfer of *custodial rights* from a bank to a nonbank

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[10] 12 U.S.C. 1828(c).

custodian when (1) the nonbank custodian does not assume any deposit liabilities; and (2) the assumption of deposit liabilities by a third-party bank is not the consideration for the sale of the custodial rights. The consideration for the transaction is a cash payment by the nonbank custodian for the right to serve as the custodian of the HSAs. Prior rulings by FDIC and other federal banking agencies support this conclusion, and there is no other policy support or reasoning for increasing the scope of the Act to apply to these situations.

9. FDIC should comprehensively review the implications of the current regulations and the Statement on merger transactions involving banks and credit unions.

According to FDIC, 121 bank merger applications involving credit unions were approved between 2004 and 2023. [89 Fed. Reg. 24312, 24330] Although merger applications may involve entities not insured by FDIC, regulators in several states—Colorado, Minnesota, Nebraska, and Tennessee—have rejected bank mergers with credit unions. Regulators in Iowa and South Carolina have indicated they would respond similarly if such applications were filed in those states. In addition, both Mississippi and Tennessee have enacted laws effectively barring such transactions.

Credit union bank acquisitions represented over twenty-seven percent of announced mergers in 2024 so far, the highest percentage to date.[11] As more credit unions acquire banks and the average assets of targeted banks continue to grow, FDIC should examine the competitive effects of such mergers. FDIC should also study their impact on consumers and the communities in which the entities operate. Credit unions already enjoy highly preferential treatment and tax advantages as compared to banks. They should not be allowed to run rough shod around merger and monopoly protections that banks must adhere to, and bank merger application analyses should include consideration of credit unions and their competitive effects.

As not-for-profit cooperatives owned and operated by their members, credit unions have a statutory mission to provide basic consumer financial services to those of "modest means." The Federal Credit Union Act ("FCU Act") was enacted 90 years ago and is intended to enable small groups of individuals connected through common bonds in local communities to pool their resources and support one another financially. Given their mission and structure, these financial institutions are exempt from most taxes and the CRA. This gives credit unions a significant competitive advantage over insured banks. This advantage should not be further increased by also granting credit unions preferential merger review treatment, as credit union purchase of banks continues to rise at a startling pace. Yet FDIC seems unconcerned about this concentration of market share and power.

Despite certain limitations promulgated by the FCU Act regarding membership, business lending, and capital market activities, among others, legislative and regulatory changes

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[11] S&P Global Market Intelligence, *Credit Union-Bank Deals Becoming Bigger Part of M&A Landscape*, S&P GLOBAL (May 28, 2024), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/credit-union-bank-deals-becoming-bigger-part-of-m-a-landscape-80842307.

have helped credit unions find a way around the FCU Act's restrictions. Together with the tax and CRA exemptions, these policy modifications have facilitated growth within the credit union industry; credit unions now have $2.2 trillion in assets with 140 million members systemwide.

Bank acquisitions clearly demonstrate how credit union activities have expanded far beyond the original congressional intent. Rather than serving their existing members, "a credit union's purchase of a bank is typically a strategic action to expand its geographic footprint or to grow a loan program," as stated by the National Credit Union Administration (NCUA).[12] Clearly, it is no longer the goal of credit unions to serve small, local, connected memberships. Rather, these preferentially treated depositories seek to have their cake and eat it too: they want all the preferential treatment that comes with being a credit union, with all of the benefits of a bank charter. Arguably most concerning, although NCUA has conveyed to Congress its intent to harmonize its position with federal bank regulators as it relates to supervision, "former bank customers that are now credit union members may have less consumer financial protection oversight after the bank-to-credit union transaction."[13] Is this not concerning to FDIC? Should bank mergers with credit unions not be given appropriate consideration given the potential harm to consumers?

This movement into traditional "bank territory" is not limited to simply expanding a credit union's geographic footprint. Credit unions have also sought to expand their authority to offer financial products and services outside of their original mandate of serving local consumers with a common connection. In fact, the Federal Reserve's Community Depository Institutions Advisory Council ("CDIAC") noted that regulator indifference to (and even support of) credit unions' efforts to expand their footprints and offerings has allowed credit unions to "venture into [the] commercial lending space beyond their traditional consumer customer base."[14] The CDIAC also found that the tax status of credit unions emboldens "them to engage in deals that might seem economically unviable for other financial institutions." Their ability to offer cash through their retained earnings gives them a "distinct advantage" making them "desirable candidates for such deals."

IBC is also concerned about the effects that the elimination of CRA and tax obligations could have on investments in jurisdictions where these transactions take place. Removing these obligations on significant deposit bases could have substantial, deleterious effects on the communities at issue, to say nothing of the changes to, and likely decrease in, competition in the area. Banks pay their fair share, and are required to show meaningful efforts to offer financial products and services to the members of the communities they

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[12] National Credit Union Administration, *NCUA Response to Congressman French Hill's Questions on Credit Union-Bank Transactions*, NCUA (2024), https://ncua.gov/foia/library/ncua-response-congressman-french-hill-questions-credit-union-bank-transactions.

[13] *See* fn11.

[14] Federal Reserve Board, *Community Depository Institutions Advisory Council Meeting*, Federal Reserve (Nov. 16, 2023), https://www.federalreserve.gov/aboutthefed/files/CDIAC-meeting-20231116.pdf.

serve. Credit unions have been resting on their laurels and taking full advantage of the preferential treatment given to them under the federal statutes and regulations. FDIC should not make this preferential treatment even worse in its merger application decisioning policy.

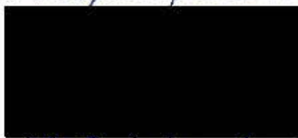
As FDIC considers revisions to its Statement of Policy on Bank Merger Transactions, credit union mergers with banks warrant far greater attention as they are increasing in frequency, greatly affect the bank merger landscape, and do not require member votes of approval when the credit union is the surviving entity. FDIC should also scrutinize bank merger applications involving credit unions to the highest extent possible. Without further analysis and factual support, the benefits these transactions provide bank customers, credit union members, and the communities in which they operate remain yet to be determined. FDIC should investigate these issues and publish a report on its findings in order to make sound regulatory decisions.

Conclusion

While IBC appreciates FDIC's attempt to modernize the incredibly outdated merger regulations, the Statement proposed is incredibly vague and only adds more uncertainty to an already completely opaque process. Under the Statement's unclear and ambiguous terms, FDIC would have an inappropriate level of discretion over bank merger applications. The Statement would make the process even more arbitrary and uncertain, and would likely lengthen the already interminably frustrating process of merger application review and decisioning. This will absolutely have a chilling effect on bank merger activity, including among small and mid-sized banks where consolidation or resources could strengthen their ability to offer consumer financial products and services and compete with large banks. The unintended consequence of the Statement could well be to reduce, not promote, competition in the banking industry. For all these reasons, the Statement should be rescinded and reconsidered with further input from the industry and other stakeholders.

Thank you for the opportunity to share IBCs views on these matters.

INTERNATIONAL BANCSHARES CORPORATION



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