National Community Reinvestment Coalition

July 31, 2023

The Honorable Martin Gruenberg
Acting Chair of the Board
The Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, D.C. 20429

The Honorable Michael Hsu
Acting Comptroller of the Currency
Office of the Comptroller of the Currency
400 7th Street, SW
Washington, D.C. 20219

The Honorable Michael Barr
Vice Chair for Supervision
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, D.C. 20551

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552

Dear Acting Chair Gruenberg, Acting Comptroller Hsu, Vice Chair Barr, and Director Chopra:

We are writing to update our comment letter on the bank merger review process submitted in December 2022 and to emphasize again the importance of taking prompt action to implement reforms. Since submitting our comment, we have met with the FDIC, Federal Reserve, and OCC to discuss our recommendations. We are now formally requesting that these agencies start an interagency rulemaking process as soon as possible to better align merger reviews with the statutory requirements established by the Bank Merger Act. In particular, regulators must take additional steps to ensure that mergers actually serve the convenience and needs of under-resourced communities. Regulators should establish a rebuttable presumption that a merger will not enhance efforts for financial inclusion and economic improvement. Community benefits agreements (CBAs) negotiated between merging financial institutions and community representatives are the ideal way to demonstrate how a merger will benefit the public, and federal regulators must use conditional approvals and regular assessments of CBA performance to ensure commitments are fully implemented. This letter also updates some of our previous recommendations about how to analyze the competitive effects of mergers.

The National Community Reinvestment Coalition and 108 national, state, and local member organizations call on the prudential regulators to expedite the process for bank merger reform.

The National Community Reinvestment Coalition and its grassroots member organizations create opportunities for people to build wealth. We work with community leaders, policymakers and financial institutions to champion fairness in banking, housing and business. NCRC was formed in 1990 by national, regional and local organizations to increase the flow of private capital into traditionally underserved communities. NCRC has grown into an association of more than 600 community-based organizations that promote access to basic banking services, affordable housing, entrepreneurship, job creation and vibrant communities for America's working families.

In the July 2021 executive order, the Biden Administration called on all federal policymakers to address concerns with corporate consolidation throughout the economy.[1] Two years have passed since then. On February 7th, 2022 Martin Gruenberg published a statement announcing his intent to make bank merger review one of the FDIC's top priorities for 2023.[2]

Bank merger reform is sorely needed. Once announced to the public, bank merger applications are almost always approved. The Federal Reserve did not deny a formally-announced application between 2006 and 2017 - a string of more than 3,000 consecutive approvals.[3] While almost 500 were withdrawn, those decisions occurred behind closed doors. This record makes a statement on how reviewers determine public benefits. The only consideration of a merger's benefits to the public happened behind closed doors, without consultation from the public.

The National Community Reinvestment Coalition believes that merger reviews must ensure public benefit. The Bank Merger Act (BMA) compels reviews to consider the "conveniences and needs" of the public. The benefits to the public of a merger should be as great or greater than the rewards of the transaction to the combining financial institutions (FI). Each prudential regulator should assess how it identifies the conveniences and needs of the public, ensures they become part of any approval, and verifies the post-merger performance by the FIs to meet their commitments. As a foundational step toward the goal, applicants should negotiate a community benefits agreement (CBA) with representatives of groups and individuals from the communities affected by the proposed merger, and federal regulators should hold the FIs accountable to meet the terms of the CBAs.

SUMMARY

I. Review of effects on competition: Regulators have favored scale and efficiency over the need to protect markets from concentration. Regulators should reduce the emphasis placed on HHI, consider all aspects of banking and not just deposit concentration, be wary of mergers that would reduce access to

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[1] The White House. (2021, July 9th). *Executive Order on Promoting Competition in the American Economy* [Presidential Actions]. The White House Briefing Room. https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/

[2] Acting Chairman Martin J. Gruenberg. (2022, February 7th). *Acting Chairman Martin J. Gruenberg Announces FDIC Priorities for 2022*. https://www.fdic.gov/news/press-releases/2022/pr22015.html

[3] Chairman Jerome Powell. (2018, May 10th). *Powell Response on Banker Mergers to Sen. Elizabeth Warren* [Letter]. https://www.warren.senate.gov/imo/media/doc/Powell%20Response%20re%20Mergers.pdf

certain products or services, and exclude the presence of non-banks in concentration calculations. Finally, reviews should do more to consider mergers on the overall health of local economies.

i. Reviewers should reconsider the role of Herfindahl-Hirschman Index (HHI) scores when evaluating the impacts of a merger on competition.

ii. Consumers choose a branch based on proximity to their home or work. Rather than gauge competition across a metropolitan statistical area (MSA), reviews should rely on a measure that aligns with how consumers select a bank.

iii. *To address the possibility that reviews based only on HHI-driven measures of deposit concentration will fail to identify anti-competitive risks, including harm to the public, agencies should consider all aspects of "the business of banking:" taking deposits, making loans, and processing payments*.

iv. Analyses of competition should exclude participation by non-depositories.

*v. Reviews should consider the impact of mergers on the overall health of local economie*s.

vi. All mergers have anti-competitive effects. Even when a merger has benefits, it may present greater harms. All reviews should start with a presumption that a merger is not beneficial.

II. Public benefits: To realize Congress's intents, regulators should reorient merger review to an accountability framework that puts greater weight on public benefits. Regulators should establish a rebuttable presumption that a merger will not enhance efforts for financial inclusion and economic improvement. Community benefits agreements should be central in discerning public benefits in a merger review.

i. In the review process, the size of benefits incurred by the public from a merger should be given as much or greater weight as the benefit to the merging banks. Approvals should not result in new harm.

ii. Certain communities have suffered disproportionately. Communities most affected include rural counties, distressed areas, and places where populations include greater-than-average shares of people of color.

iii. Reviews cannot assume that a satisfactory CRA exam signals that a merger serves the public interest. Reviews should consider CRA exams as a part of a broader analysis of public benefit indicators. Regulators must not take a prior "outstanding" CRA exam as proof that the public will benefit from a merger automatically.

iv. The example of Capital One shows why merger approvals must include commitments by regulators to hold banks accountable after a merger is completed.

v. As a condition of approval, applicants should sign community benefits agreements (CBAs) or create community benefits plans (CBPs) in some instances. CBAs and CBPs facilitate dialogue, capture the conveniences and needs of the public served, and support an ongoing exchange of information between banks and communities beyond the completion of a merger.

vi. A community benefits plan may be a valid alternative to a CBA in circumstances where there is no opportunity to organize a response from communities impacted by a merger.

vii. Coordination by prudential regulators with the CFPB, the Department of Justice, the Federal Trade Commission, state attorneys general, coordinators of state CRA regimes, and state financial regulators is essential to successful analyses of public benefits and harms.

viii. Regulators should establish a rebuttable presumption that a merger will not enhance efforts for financial inclusion and economic improvement.

ix. Larger mergers require additional scrutiny. Reviews should be wary of how larger combinations will impact the public. Expectations for public benefits should increase when mergers are more significant, and steps to hold banks accountable after mergers should be more robust.

x. Approval of a new domestic systematically important bank (DSIB) or global systematically important bank (GSIB) should include specific expectations to address inequities in the financial system.

III. Managerial controls and financial stability; Regulators must include problems with compliance with fair lending practices and other consumer protection rules as grounds for assessing applicants with weaknesses in managerial controls.

i. Merger approvals must be conditioned on the commitments by banks to show they will rectify weaknesses in the treatment of protected class members.

ii. Violations of consumer protection laws should be defined as a failure to implement proper managerial controls.

DISCUSSION

I. Review of effects on competition: Regulators have favored scale and efficiency over the need to protect markets from concentration. Regulators should reduce the emphasis placed on HHI, consider all aspects of banking and not just deposit concentration, be wary of mergers that would reduce access to certain products or services, and exclude the presence of non-banks in concentration calculations. Finally, reviews should do more to consider mergers on the overall health of local economies.

National Community Reinvestment Coalition

Many markets demonstrate concentration levels above Bank Merger Competitive Review Guidelines. In the last two decades, thousands of banks have participated in mergers. We have reached a point where there are only half as many banks today as in 2000.[4]

i. *Reviewers should reconsider the role of Herfindahl-Hirschman Index (HHI) scores when evaluating the impacts of a merger on competition.*

The HHI is a simplistic lens introduced by laissez-faire economists whose views were out of step with the perspectives imbued in the BMA by Congress. As a step in redefining the evaluation of competition through the legal and economic lens of consumer welfare, the Reagan Administration introduced the HHI to merger reviews.[5] The HHI change coincided with a shift from the logic of the Clayton Antitrust Act, which held a view that overconcentration was negative, to a new approach that said that mergers could also create benefits to markets through greater efficiencies.[6]

The 1995 Bank Merger Competitive Review Guidelines (the "Guidelines") further formalized the shift when it indicated the merger reviews would "rely primarily on the effects of competition in predefined markets…to the extent that the post-merger Herfindahl-Hirschman Index does not exceed 1800 or increase by more than 200, the federal banking agencies generally are unlikely to review further the competitive effects of a merger."[7]

In practice, applicants have not been held accountable for meeting the standards outlined in the Guidelines. Research from the Federal Reserve Bank of St. Louis provides many data points to support the argument that the agencies have not effectively enforced the Guidelines: the share of banking markets with HHIs above 1,800 has increased since 2000, the average HHI for all banking markets exceeds 3,400, and the overall average HHI has steadily increased since 2005.[8]

Another problem is that overconcentration is not randomly distributed across the country. By 2017, 89 percent of rural markets had HHIs that met the "highly concentrated" definition, compared to fewer than 30 percent of urban areas.[9]

Prior applications could have forced more divestitures. Still, they did not, and now a new and perhaps unforeseen problem has emerged. In many rural areas, the Guidelines disqualify applications from all buyers with any existing presence in the market. Regulators should consider alternatives to their current

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[4] Roison McCord, Edward S. Prescott, & Tim Sablik. (2015). *Explaining the Decline in the Number of Banks since the Great Recession* (No. 15-03). Federal Reserve Bank of Richmond. https://www.richmondfed.org/publications/research/economic_brief/2015/eb_15-03

[5] Calkins, S. (1983). The New Merger Guidelines and the Herfindahl-Hirschman Index. *California Law Review*, *71*(2), 402–429. https://doi.org/10.2307/3480160

[6] Adil Abdela & Marshall Steinbaum. (2018). *The United States has a Market Concentration Problem: Reviewing Concentration Estimates in Antitrust Markets, 2000-Present*. Roosevelt Institute. https://www.ftc.gov/system/files/documents/public_comments/2018/09/ftc-2018-0074-d-0042-155544.pdf

[7] Federal Deposit Insurance Corporation. (2022). Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions. Federal Register. https://www.federalregister.gov/documents/2022/03/31/2022-06720/request-for-information-and-comment-on-rules-regulations-guidance-and-statements-of-policy-regarding

[8] Federal Reserve Bank of St. Louis. (2018, June 11). The ABCs of HHI: Competition and Community Banks. *On the Economy Blog.* https://www.stlouisfed.org/on-the-economy/2018/june/hhi-competition-community-banks

[9] Andrew P. Meyer. (2018). *Market Concentration's Impact on Community Banks* [Regional Economist]. Federal Reserve Bank of St. Louis. https://www.stlouisfed.org/publications/regional-economist/first-quarter-2018/concentration-community-banks

methods for evaluating anti-competitive markets. The current approach is blunt and narrow. They must update reviews to account for the changing nature of how banking services are delivered and include activities other than deposit-taking. Throughout all phases, the agencies should see that a critical step in resolving anti-competitive effects lies with using the conveniences and needs factor in the public benefits prong. The new approach would consider many factors - not just deposit concentrations - and would be better suited for assessing the threats posed by any merger to competition.

When so many areas have HHIs well above the 1,800-level threshold, it calls for reconsidering the emphasis given to it within merger review. The need to reconsider applies to all mergers, not only those that are over or close to a threshold.

Nonetheless, reviews will have more nuance if they find an alternative to HHI. The HHI's focus is too narrow. It ignores how all mergers – not just a few on the frontiers of the HHI's line in the sand – expose consumers to problems associated with concentration. Because a low HHI score may act as the basis to give short shrift to the conveniences and needs of the public, its use creates a framework that may undermine the public interest.

Moreover, post-merger research shows that HHI missed many cases when consolidation did lead to harms.

ii. Consumers choose a branch based on proximity to their home or work. Rather than gauge competition across a metropolitan statistical area (MSA), reviews should rely on a measure that aligns with how consumers select a bank.

Most consumers choose a bank because it has a branch near their home or place of work. People are willing to give up a lot in interest paid for their deposits to have a bank with a branch that is closer to their home: one study said they will give up 35 percent on interest rates to avoid traveling an extra 3/4ths of one mile and 13 percent to avoid an additional ¼ mile.[10]

A different approach is to look at the proximity between branches of the merging institutions. One report uses a metric based on the average of the distance between pairs of proximate branches in an MSA. His initial analysis was that "close-proximity" mergers (less than an average of four miles) had anti-competitive effects, but that the difference fell when geographic overlaps lessened. Close-proximity mergers led to more branch closures and for a longer period of time.[11]

Interestingly, harms to consumers were observed not by prices (interest rates on loans and deposit accounts) at the newly-consolidated institution, but by customers of other banks in the area. Seeing fewer rivals, banks not party to the merger reduced rates paid on deposits and increased lending costs.

As well, the HHI test did not flag many of the most harmful close-proximity mergers.

[10] Ho, K., & Ishii, J. (2011). Location and competition in retail banking. *International Journal of Industrial Organization, 29*(5), 537–546.

[11] David Benson, Samuel Blattner, Serafin Grundl, You Suk Kim, & Ken Onishi. (2022, March 30). *Concentration and Geographic Proximity in Antitrust Policy: Evidence from Bank Mergers*. https://www.aeaweb.org/conference/2023/program/paper/ribyzNRd

iii. To address the possibility that reviews based only on HHI-driven measures of deposit concentration will fail to identify anti-competitive risks, including harm to the public, agencies should consider all aspects of "the business of banking:" taking deposits, making loans, and processing payments.

The current approach limits analysis to the concentration of deposits. Not only is that limiting, especially in an era of unbundling, but by ignoring credit services, merger reviews ignore the primary way banks help people build assets. Credit is an essential tool for building wealth - and relatedly, it is also necessary for closing the racial wealth gap.

Even if deposits are diversely distributed among local banks, access to other financial services could be threatened. Even if a rural community has seven banks, for example, individual consumers and small businesses might face a situation where only one or two banks offer the product(s) they need. As currently framed, a merger review would not be sensitive to the risk that credit availability for small businesses might decline due to a merger. Services could disappear from a community entirely, but as long as deposit concentrations remained below the HHI threshold, the evaluation would show that the competition prong was satisfied. Reviews should consider how a merger will impact the needs of various consumers of banking services. They should consider the merger's potential to increase borrowing costs and reduce access to services for small businesses, farms, and startups.

iv. Analyses of competition should exclude the role of non-depositories.

A banking charter is a privilege. Merger approvals granted on the belief that a market is competitive should only consider competition among charter holders. Doing otherwise weakens the responsibility of charter holders to meet the conveniences and needs of their communities.

Banks are ceding market share to non-depositories in several types of credit. This development demonstrates how many banks do not meet the conveniences and needs of communities for credit. Today, non-depositories now originate more than half of all mortgage loans.[12] In many rural areas where farm lending is the primary need, non-banks constitute a significant source of credit to farmers.[13] In 2014, only one of the top five lenders for manufactured housing was a bank. Since then, that single bank exited the market. By 2019, the list of the top 15 manufactured housing lenders included only three banks, making up only 2.6 of the market.[14]

Reviews must understand the role played by non-depositories in lending. In fact, when a review of lending in a market finds that many people use non-banks, reviewers should be weary of further consolidation among banks. In these instances, reviewers should ask how a merger will increase the share of lending by chartered institutions. Most likely, such a merger will further reduce the share of participation by banks as a whole.

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[12] Orla McCaffrey. (2021, June 22nd). Nonbank Lenders Are Dominating the Mortgage Market. *Wall Street Journal*. https://www.wsj.com/articles/nonbank-lenders-are-dominating-the-mortgage-market-11624367460

[13] Charles S. Morris, James Wilkinson, & Eric Hogue. (2015). Competition in Local Agricultural Lending Markets: The Effect of the Farm Credit System. *Economic Review*, 51–78.

[14] Schneider, K., Schwartz, N., Russell, J., O'Reilly, E., Melton, N., & Leitner, S. (2021). *Manufactured Housing Finance: New Insights from the Home Mortgage Disclosure Act Data.* Consumer Financial Protection Bureau. https://www.ssrn.com/abstract=3911409

When banks with partnership programs are acquired, regulators should clarify that the review will consider the benefits and harms to consumers who access services through a bank partnership program.

v. Reviews should consider the impact of mergers on the overall health of local economies.

Economic signals across the economy underscore the basis for that action: new business formation has fallen by almost 50 percent since the 1970s,[15] racial inequality is widening,[16] and the share of productivity growth returned to workers through wages has lagged returns to shareholders.[17]

While certainly a concern, the focus on whether there will be fewer options for a saving account discounts the actual level of value brought by banks to their communities. Unless competitive reviews are altered, that myopia will remain the standard. The Biden Administration's Executive Order highlighted how concentrations in one sector might lead to negative externalities for businesses and employees in other sectors.[18] Their insight underscores why a fulsome review of a merger review is essential. Because of the role played by those banks in supporting commercial activity in their areas, some mergers will have significant ramifications for many aspects beyond banking. Indeed, we agree with the principle that firewalls should exist to separate banking from commerce, but we also recognize that banking plays a crucial factor in enabling commerce. When communities lose access to banks, their consumers and small businesses will lose access to credit.[19] and other banking services,[20] and all aspects of their local economy will experience challenges. There are downstream impacts that must be considered.

vi. All mergers have anti-competitive effects. Even when a merger has benefits, it may present greater harms. All reviews should start with a presumption that a merger is not beneficial.

The perspective underlying reviews must shift, starting with a foundational view that all mergers have anti-competitive effects. All mergers present risks for consumer choice. Thus, all merger reviews should dispense with the structure where need for public benefits is conditioned on an HHI threshold crossing. All merger reviews must ensure that the combination results in a benefit to the public. Again, reviews

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15 John Lettieri & Kenan Fikri. (2022). *The Case for Economic Dynamism And Why It Matters for the American Worker*. Economic Innovation Group. https://eig.org/dynamism/

16 Derrick Hamilton & Madeline Neighly. (2019). *The Racial Rules of Corporate Power: How Extractive Corporate Power Harms Black and Brown Communities and How Race-Conscious Solutions Can Create an Inclusive Economy* (Corporate Power). Roosevelt Institute. https://rooseveltinstitute.org/publications/racial-rules-of-corporate-power-extractive-corporate-power-race-conscious-solutions-inclusive-economy/

17 Lawrence Mishel. (2021, September 2nd). Growing inequalities, reflecting growing employer power, have generated a gap between worker productivity and pay since 1979: Productivity has grown 3.5 times as much as pay for the typical worker [Economic Policy Institute]. *Working Economics Blog*. https://www.epi.org/blog/growing-inequalities-reflecting-growing-employer-power-have-generated-a-productivity-pay-gap-since-1979-productivity-has-grown-3-5-times-as-much-as-pay-for-the-typical-worker/

18 The White House. (2021, July 9th). *Executive Order on Promoting Competition in the American Economy* [Presidential Actions]. The White House Briefing Room. https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/

19 Andrew Dumont & Amanda Roberts. (2019). *The Fed - Perspectives from Main Street: Bank Branch Access in Rural Communities*. Board of Governors of the Federal Reserve System. https://www.federalreserve.gov/publications/november-2019-bank-branch-access-in-rural-communities.htm

20 Dr. Bruce Mitchell & Jason Richardson. (2021). *Relationships Matter: Small Business and Bank Branch Locations » NCRC*. National Community Reinvestment Coalition. https://ncrc.org/relationships-matter-small-business-and-bank-branch-locations/

should recognize as a preordained fact that any merger will benefit the applicants. To honor Congress' intent for a public benefit, approvals must require a benefit to the public that is of equal or greater impact.

Relatedly, reviews should fold the risk of harm into the overall evaluation of the public's benefit. A merger could present benefits, but the harm might compromise or overshadow those gains. Thus, a second criterion is to view the public benefit as the overall net gain of benefits minus harms.

II. Public benefits: To realize Congress's intents, regulators should reorient merger review to an accountability framework that puts greater weight on public benefits. Community benefits agreements should be central in discerning public benefits in a merger review.

i. In the review process, the size of benefits incurred by the public from a merger should be given as much or greater weight as the benefit to the merging banks. Approvals should not result in new harm.

Banks agree to mergers when consolidation improves the rate of return on invested capital. After near-term transactional costs are absorbed, banks achieve greater operational profitability.[21] The benefit derived by banks increased after the 1997 Riegel-Neal Interstate Branching Act gave banks greater power to expand their geographic footprints.[22] After mergers, efficiency ratios fall because of economies of scale,[23] which benefits banks and their shareholders.

What is not as straightforward - and what regulators should verify - is if a merger will lead to a gain for the public. The examples of outcomes in the cost of borrowing, interest earned on deposits, and the ongoing share of unbanked households suggest a disconnect between efficiency returns and public benefit.

A part of that approach must include assessing the possibility that a merger will make things worse for consumers. If an acquiring bank uses an overdraft policy that is less forgiving than the one at the prior bank, it should be incumbent on the reviewer to note that problem. Once registered, reviewers should condition approval on the implementation of a remedy.

ii. Certain communities have suffered disproportionately. Communities most affected include rural counties, distressed areas, and places where populations include greater-than-average shares of people of color.[24]

Despite thousands of mergers, each of which led to benefits for the applicants, banks' record in meeting the conveniences and needs of the public is mixed. These outcomes do not challenge the view that concentrations can undermine consumer interests but merely underscore how regulatory treatment of

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[21] Bliss, R. T., & Rosen, R. J. (2000). *CEO Compensation and Bank Mergers* (SSRN Scholarly Paper ID 210908). Social Science Research Network. https://doi.org/10.2139/ssrn.210908

[22] Cornett, M. M., McNutt, J. J., & Tehranian, H. (2006). Performance Changes around Bank Mergers: Revenue Enhancements versus Cost Reductions. *Journal of Money, Credit and Banking, 38*(4), 1013–1050.

[23] Kowalik, M., Davig, T., Morris, C. S., & Regehr, K. (2015). Bank Consolidation and Merger Activity Following the Crisis. *Economic Review*, 20.

[24] Andrew Dumont & Amanda Roberts. (2019). *The Fed - Perspectives from Main Street: Bank Branch Access in Rural Communities* (p. 32). Board of Governors of the Federal Reserve System. https://www.federalreserve.gov/publications/november-2019-bank-branch-access-in-rural-communities.htm

applications has failed to balance the benefits of merging banks with the conveniences and needs of consumers living in the areas where those mergers have taken place.

A diverse body of research reveals many proof points to illustrate the disconnect. In deposit services - the place where merger review occurs - the rapid consolidation in banking has not led to consumer gains. Mergers did not reduce the price for overdraft fees, and in fact, most institutions have raised the price charged even though automation has reduced operational costs and the use of checks has been replaced by payment methods that can clear in real-time.[25] To the extent that new demand deposit accounts without overdraft fees entered the market, they were offered by new neobanks that entered the market as startups and not as a result of post-merger consolidations. Tens of millions of Americans remain unbanked or underbanked, with 29.1 percent of the unbanked pointing to the minimum balance requirements imposed by banks as their primary reason for living outside the financial system.[26]In areas where a large bank purchases a small bank, the number of check cashing and other non-bank financial service providers increases.[27]

In credit markets - which reviews ignore - the same patterns hold. After mergers have concentrated markets, banks subsequently pay lower interest rates on deposits.[28] Research shows that concentration can lead to higher interest rates borrowers pay on retail loans.[29] Small business lending shrinks after consolidation,[30] and the negative impacts were highest in communities where an out-of-market institution purchased a local bank.[31] Only a few banks offer meaningful small-dollar credit products at scale.

The approach must change. There is no clear linkage between the scope of benefits accorded to banks versus those received by consumers. Regulators must act swiftly to restore the consideration of public benefits in merger reviews.

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25 Adamczyk, A. (2010, October 20). *Overdraft fees hit another record high this year—Here's how to avoid them*. CNBC. https://www.cnbc.com/2021/10/20/overdraft-fees-hit-another-record-highheres-how-to-avoid-them.html

26 Federal Deposit Insurance Corporation. (2021). *How America Banks: Household Use of Banking and Financial Services, 2019 FDIC Survey*. Federal Deposit Insurance Corporation. https://www.fdic.gov/analysis/household-survey/index.html

27 Bord, V. M. (2018). Bank Consolidation and Financial Inclusion: The Adverse Effects of Bank Mergers on Depositors. *Harvard Business School*, 89.

28 Berger, A., & Hannan, T. (1989). The Price-Concentration Relationship in Banking. *The Review of Economics and Statistics*, *71*(2), 291–299.

29 Montoriol-Garriga, J. (2008). *Bank Mergers and Lending Relationships* (SSRN Scholarly Paper ID 1240861). Social Science Research Network. https://doi.org/10.2139/ssrn.1240861

30 McComas, M., & Miller, M. (2019). *The Local Impact of Bank Mergers on Small Business Lending: A Baltimore Example* (p. 8). Johns Hopkins 21st Century Initiative. https://21cc.jhu.edu/wp-content/uploads/2019/06/the-local-impact-of-bank-mergers-on-small-business-lending.pdf

31 Jagtiani, J., & Maingi, R. Q. (2019). *How Important Are Local Community Banks to Small Business Lending? Evidence from Mergers and Acquisitions* (Working Paper (Federal Reserve Bank of Philadelphia) No. 18–18; Working Paper (Federal Reserve Bank of Philadelphia), pp. 18–18). Federal Reserve Bank of Philadelphia. https://doi.org/10.21799/frbp.wp.2018.18

iii. Reviews cannot assume that a satisfactory CRA exam signals that a merger serves the public interest. Reviews should consider CRA exams as a part of a broader analysis of public benefit indicators. Regulators must not take a prior "outstanding" CRA exam as proof that the public will benefit from a merger automatically.

Merger reviews use recent CRA exams to inform evaluations of public benefits. The generally-understood practice is that banks with CRA ratings of “substantial non-compliance” or “needs to improve” will be required to resolve deficiencies as a condition of approval. Conversely, banks with an overall “satisfactory” or “outstanding” rating receive credit toward the public benefit test even if they have a less-than-satisfactory grade on one of the CRA subtests.[32]

However, CRA exams are backward-facing and do not relate to the benefits consumers will experience after a merger approval. Indeed, we should recognize the risk that leaders of merging banks might rely on an “outstanding” CRA exam score to rebuff efforts from community groups to secure benefits.

During reviews, regulators should ensure that a merger would not weaken the scope of CRA supervision in an affected area. Plausible scenarios exist to demonstrate this concern. For example, when intermediate and small banks acquire branches from a large bank, possibly as part of a divestiture, it replaces an institution with a large bank CRA exam with a lighter one that no longer includes an analysis of the acquiring institution’s branches or community development loans and investments depending on the asset size of the acquiring institution. Even in instances where the acquiring institution is also a large bank, divestitures could result in an assessment area receiving a limited scope review of CRA activities instead of the more in depth full scope review. The same scenario could also create longer gaps between examinations. Similarly, when a credit union buys a bank, it lessens the number of institutions with a CRA obligation. When an online bank buys a branch-focused one, it could result in branch closures, with the effect of stripping CRA obligations from a region. Such mergers could create "CRA deserts." Merger reviews should consider overcoming these outcomes by placing expectations on applicants to make a public commitment to increasing their lending and investments in the community.

iv. The example of Capital One shows why merger approvals must include commitments by regulators to hold banks accountable after a merger is completed.

Capital One's history provides an excellent example to demonstrate our concerns. Capital One acquired Hibernia Bank in 2005 and North Fork Bank in 2006. Both of the acquiring banks had substantial mortgage lending operations. GreenPoint Mortgage, a subsidiary of North Fork Bank, in 2007. GreenPoint was not a minor division - it had 1,100 employees before it was shuttered.[33] Capital One, which primarily offered credit cards and auto loans, subsequently shut down the mortgage division. That underscores an earlier point of this letter: reviews must consider impacts outside of deposit services, including the prospect that a merger would result in fewer types of credit products. In 2011, Capital One announced that it would acquire ING Direct. Capital One was approaching “too big to fail” status. Given that Capital One had a narrow set of products - essentially two relatively high-risk categories - it should

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[32] Board of Governors of the Federal Reserve. (2014). *Enhancing Transparency in the Federal Reserve’s Applications Process* (SR 14-2). Division of Banking Supervision and Regulation. https://www.federalreserve.gov/supervisionreg/srletters/sr1402.pdf

[33] Dan Wilchins. (2007, August 26). Capital One slashes jobs, mortgage industry swoons. *Reuters*. https://www.reuters.com/article/us-financial-mortgages-idUSN2027429520070820

have triggered concern about the safety and soundness of the growing institution.[34] Merger approval came in 2012, but despite the expectation in the BMA that approvals lead to benefits, they did not appear to apply in this case. By the end of the following year, Capital One had closed 42 of the branches it had acquired. ING Direct had a retail home mortgage and home equity line of credit divisions, but Capital One exited those operations several years later. In 2012, within two months before merger approval, the bank revealed that it would have to pay over $200 million in penalties and restitution related to its deceptive tactics in selling payment protection products to consumers.[35]

To this day, Capital One does not offer mortgage loans. Its focus remains on auto lending and credit cards. Capital One has grown larger and more profitable through acquisitions, but the record shows that consumers did not share in the benefits for all purposes.

The Capital One story shows why regulators cannot assume that applicants will live up to their promises. They must incorporate procedures that will hold banks accountable after approval. Representatives of the communities affected by the merger should be consulted in the process. Approvals should state how the performance of commitments made for public benefits will be evaluated, with specific metrics, on a year-by-year basis, for each commitment category. Regulators should state how they will respond to non-performance. For smaller institutions, penalties could prevent those institutions from participating in new mergers or sales (short for instances of insolvency). For all institutions, non-performance should lead to a significant downgrade on future CRA exams.

v. As a condition of approval, applicants should sign community benefits agreements (CBAs) or create community benefits plans (CBPs) in some instances. CBAs and CBPs facilitate dialogue, capture the conveniences and needs of the public served, and support an ongoing exchange of information between banks and communities beyond the completion of a merger.

CBAs allow public needs to be captured through a common forum rather than through a scattershot process of one-off engagements. Banks may not understand the needs of the public - particularly in communities where a merger involves the purchase of a local bank by an out-of-market bank. CBAs allow banks to send a message about their intent to serve their communities. As vehicles to gather public input, CBAs are preferable because they can bring many local stakeholders into a single venue where the contours of the conveniences and needs of the public can be systematically captured. After they are signed, NCRC's CBAs call for regular meetings between bank leadership and a set of representatives of local communities.

vi. A community benefits plan may be a valid alternative to a CBA in circumstances where there is no opportunity to organize a response from communities impacted by a merger.

Since 2016, NCRC and its members have signed 23 CBAs, resulting in $574 billion in consumer benefits. During that time, however, far more merger applications have been approved. In general, NCRC devotes its resources to more significant mergers. Mergers completed without CBAs are of two types: either ones where the applicants refused to participate or cases where local communities did not muster to organize

[34] Ellis, B. (2013, January 25th). Era of online and mobile banking. *CNNMoney*. [71]https://money.cnn.com/2013/01/25/pf/banks-online-mobile-banking/index.html

[35] Capital One fined for misleading millions of customers. (2012, July 12th). *BBC News*. https://www.bbc.com/news/business-18893998

themselves. The latter outcome often occurs with more minor mergers or those filed in areas without organized community groups. In these cases, where the community may not be able to speak for itself, regulators should ask applicants to create a community benefits plan (CBP). Community-benefits agreements are an effective and efficient use of time for financial institutions and community groups. Research demonstrates that CBAs lead to more significant investment and lending activity.[36] Intuitively, CBAs add efficiency to mergers because they create formal structures to ensure applicants understand the conveniences and needs of affected communities.

A CBP should contain quantitatively-expressed bank goals for increasing loans, investments, and services in communities of color and low- and moderate-income communities over a time period of three to five years after the merger.

vii. Coordination by prudential regulators with the CFPB, the Department of Justice, the Federal Trade Commission, state attorneys general, coordinators of state CRA regimes, and state financial regulators is essential to successful analyses of public benefits and harms.

Reviews should consider the records of applicants in complying with consumer protection laws and anti-discrimination laws. However, with the passage of the Consumer Financial Protection Act, authority over many of consumer protection laws shifted to the CFPB. Despite that shift, prudential regulators are not obligated to confer with the CFPB in all reviews. The centrality of the CFPB's purview is not limited to its supervisory and enforcement authority because it also has the power to collect essential data on the consumer experience. The CFPB collects data points through its consumer complaint database portal. It also collects and publishes relevant data through its Home Mortgage Disclosure Act efforts. Soon, it will gather data on small business credit.

A genuine interagency effort is the best approach. In addition to the CFPB, reviews should take input from the Federal Trade Commission, the Department of Justice (including in its anti-discrimination role), and other institutions with authority to supervise banking-related activities and that provide fair lending oversight. Reviews should not be limited to federal regulators but should also capture inputs from state financial regulators, state Attorneys General, and state courts. When available, state CRA exams should be referenced.

The example mentioned above of Capital One reinforces the need for interagency coordination and to include behind-the-scenes supervisory activity for compliance with consumer protection laws in merger reviews. The Federal Reserve approved Capital One's merger application to buy ING Direct in February 2012. Later that year, the OCC and the CFPB announced an enforcement action against Capital One for the bank's abusive and deceptive sales practices when selling payment protection and credit monitoring products. Before the announcement, the information held at the OCC and CFPB would have been available to the Federal Reserve. Still, the rules at the time called for a bank only to be penalized if it had already received a public enforcement action for fair lending violations. This event underscores why reviews should tap the CFPB and other regulators for information collected internally as a part of supervisory activities.

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[36] Raphael Bostic & Breck Robinson. (2003). Do CRA Agreements Influence Lending Patterns? *Real Estate Economics, 31*(1), 23–51.

viii. Regulators should establish a rebuttable presumption that a merger will not enhance efforts for financial inclusion and economic improvement.

Any review of public benefits should emphasize the impact of a combination on underserved communities and communities of color. To the extent that mergers increase efficiencies, they do not change the dynamics of offering small-size loans, small-dollar credit, overdraft-free low-cost bank accounts, and flexible credit for new and existing small businesses. Neither do the prospects of lower efficiency ratios do anything to ensure that communities of color will suddenly see a reversal of the adverse treatment they have historically received from financial institutions. Indeed, it is possible that such outcomes could occur from a merger. Still, regulators have no reason to take for granted that a merger will result in shifts from business practices that have failed to serve all communities adequately. Instead, as a condition of approval, reviews should require applicants to provide proof of how they will bring public benefits to these constituencies.

ix. Larger mergers require more scrutiny. Reviews should be wary of how larger combinations will impact the public. Expectations for public benefits should increase when mergers are more significant, and steps to hold banks accountable after mergers should be more robust.

More significant mergers can test the competitiveness of markets in ways that minor mergers cannot. These problems may manifest themselves in many ways. Still, all will pose risks to consumers whose increase will correlate with the degree that new combinations change the composition of local banking markets. As a result, policymakers must acknowledge that larger combinations require greater emphasis on public benefits. The right approach is not nominal, where a certain threshold triggers a more significant concern. Instead, the response should be linear - with each incremental decrease in competition. Public benefits must increase correspondingly.

Greater scrutiny should include sensitivity on a market-by-market basis.

x. Approval of a new domestic systematically important bank (DSIB) or global systematically important bank (GSIB) should include specific expectations to address inequities in the financial system.

Once a large combination is approved, it is unlikely to be unwound. That moment must be recognized as a crossroads for shaping public benefits. To that end, we should acknowledge that it represents an opportunity to increase financial inclusion and address racial wealth gaps. Approval is a moment of leverage - perhaps the last - to compel banks to play their part in leveling the playing field for underserved individuals. Creating an institution that is “too big to fail” is an opportunity that is too great to ignore.

Accordingly, an element of the public benefits prong should prioritize reversing historical inequities in access to banking services. The “public,” as defined for reviews, must acknowledge how race and ethnicity intertwine with the scope of opportunities in our country. Reviews must call on banks, as a condition of approval, to make meaningful commitments to improve the financial experience of communities of color. A record of fair lending and other unfairness should raise bars further. The permanence of a new combination - particularly ones that will become DSIBs and GSIBs post-merger - mandates greater expectations.

III. Managerial controls and financial stability; Regulators must include problems with compliance with fair lending practices and other consumer protection rules as grounds for assessing applicants with weaknesses in managerial controls.

i. Merger approvals must be conditioned on the commitments by banks to show they will rectify weaknesses in the treatment of protected class members.

Agencies should consult with the Consumer Financial Protection Bureau (CFPB) to incorporate its expertise in fair lending and other consumer protection rules in all merger reviews. Reviewers should consider conditioning approval when problems are evident and require applicants to publish plans for how they will rectify these issues.

Violations of fair lending rules - either those that resulted in public enforcement actions but also ones that only resulted in private Matters Requiring Attention (MRAs) should be evidence of shortcomings in managerial controls. Reviewers should take a similar approach to third-party relationships. Prudential regulators have published guidance on the proper management of vendors. The information gleaned from these supervisory efforts seems relevant when evaluating a review for strong managerial controls. It is especially suitable when an applicant provides "banking-as-a-service" as a core element of its overall activities.

ii. Violations of consumer protection laws should be defined as a failure to implement proper managerial controls.

Bank leadership should take responsibility for failures to meet compliance with consumer protection laws. The excuse that a small group of "rogue" employees shoulder blame for an unfair practice is disingenuous and potentially an outright falsehood. Regulators should clarify that the third prong of merger review will consider these failures.

CONCLUSION

We commend the Biden Administration for its decision to call for a review of the effects of concentration on the economy. We call for policymakers to embark on an interagency effort to reform the merger process and to do so swiftly.

We are not contending that prudential regulators should deny all mergers. Instead, we believe reviews must strengthen their consideration of how a merger meets the conveniences and needs of the public. As a part of a consideration of benefits, reviews should place extra scrutiny on how approval would impact communities of color, particularly when mergers create DSIBs and GSIBs.

All mergers lead to benefits for banks. This statement stands independently, as no applicant would file unless the opportunity presented clear benefits. On the other hand, the benefits to the public of a merger are far from certain. The default assumption surrounding any merger is that the conveniences and needs of the public will not be met without regulatory pressure. To ensure that the proper benefits composition is realized, applicants should sign a community benefits agreement with affected groups. A community benefits plan should be developed if communities do not have the necessary elements to participate.

If we can provide additional information or offer clarifications, please contact Senior Policy Advisor Adam Rust (arust@ncrc.org) or directly to me.

Sincerely,

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Chief Executive Officer
National Community Reinvestment Coalition

National Groups
Consumer Action
National NeighborWorks Association
National Association of American Veterans, Inc.

Alaska
Alaska PIRG

Alabama
City of Birmingham
HICA
Montgomery Community Action Committee & CDC, Inc.
Roosevelt Southwest Community Development Corporation
St. Peter African Methodist Episcopal Church
Titusville Development Corporation, a CDC

Arizona
Local First Arizona
Pima County Community Land Trust
UPI Loan Fund

California
California Coalition for Rural Housing
California Community Economic Development Association
CAMEO
CDC Small Business Finance
EAH Housing
Latino Leadership Council
People's Opportunity Fund
Rise Economy (formerly California Reinvestment Coalition)
Stanislaus Equity Partners
The Greenlining Institute

Colorado
African American Trade Association
NeighborWorks Southern Colorado
Urban Land Conservancy

Delaware
Delaware Community Reinvestment Action Council, Inc.

District of Columbia
Coalition for Non-Profit Housing and Economic Development

Florida
Affordable Homeownership Foundation, Inc
African American Alliance of CDFI CEOs
Community Reinvestment Alliance of South Florida
Florida Housing Coalition
St. Petersburg Neighborhood Housing Services, Inc. dba Neighborhood Home Solutions

Georgia
Alliance 85
Georgia Advancing Communities Together, Inc.
Neighborhood Improvement Association
Southwest Georgia United Empowerment Zone, Inc.

Hawaii
Hawaiʻi Alliance for Community-Based Economic Development

Illinois
Chicago Community Loan Fund
Housing Action Illinois
IFF
Universal Housing Solutions CDC
Woodstock Institute

Indiana
Continuum of Care Network Nwi, Inc.
Fair Housing Center of Central Indiana, Inc.
Gary Housing Authority
Homestead CS
Northwest Indiana Reinvestment Alliance
Prosperity Indiana
South Bend Heritage Foundation

Kentucky
Fahe

Louisiana
Family Resources of New Orleans
Jane Place Neighborhood Sustainability Initiative
Sun CHDO

Massachusetts
Massachusetts Affordable Housing Alliance
Springfield Neighborhood Housing Services

Maryland
Economic Action Maryland (formerly Maryland Consumer Rights Coalition)
Housing Options & Planning Enterprises, Inc.

Michigan
dba Development Incentives & Consulting
Fair Housing Center of Metropolitan Detroit
GenesisHOPE Community Development Corporation
Southwest Economic Solutions

Minnesota
Jewish Community Action
Black Women's Wealth Alliance

Missouri
SLEHCRA

Mississippi
HEED
Increase One, Inc.

Nebraska
Family Housing Advisory Services

New Jersey
New Jersey Citizen Action
Seniors Success Center Corporation

New Mexico
Tierra Del Sol Housing Corporation
United South Broadway Corporation

New York
Association for Neighborhood and Housing Development (ANHD)
Devotion USA, Inc.
Empire Justice Center
Fair Finance Watch
Leviticus 25 23 Alternative Fund, Inc.
New York State Rural Housing Coalition, Inc.
PathStone Enterprise Center, Inc.

North Carolina
Henderson and Company
Piedmont Business Capital Inc.
Reinvestment Partners
Welfare Reform Liaison Project, Inc.

Ohio
County Corp.
The Pride Through Empowerment Foundation, Inc
Western Reserve Community Fund
Working In Neighborhoods

Oregon
CASA of Oregon
Housing Oregon
Oregon Human Development Corporation

Pennsylvania
Ceiba
Community First Fund
Pittsburgh Community Reinvestment Group
Urban Erie Community Development Corporation

Rhode Island
HousingWorks RI

Texas
City of DeSoto
Freedman's Town
Johnson Consulting Group
Our Casas Resident Council, Inc.
South Dallas Fair Park Innercity Community Development Corporation
Southern Dallas Progress Community Development Corporation

Washington
African Community Housing and Development (ACHD)
LIHI

Wisconsin
Metropolitan Milwaukee Fair Housing Council
Newcap, Inc.