



May 30th, 2022

James P. Sheesley
Assistant Executive Secretary
Federal Deposit Insurance Corporation
550 17th St. NW
Washington, DC 20429

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

Sent by electronic mail to comments@fdic.gov

Dear Mr. Sheesley:

The National Community Reinvestment Coalition (NCRC) appreciates that the FDIC has issued a request for information regarding improvements and updates to the regulatory framework used to evaluate and approve bank mergers. The FDIC cites, among other authorities, the Presidential executive order issued last summer that requires federal agencies to consider the impact of industry consolidation on the fair, open, and competitive marketplace, and on the welfare of workers, farmers, small businesses, startups and consumers (Executive Order 14036).¹

In keeping with Executive Order 14036 and with Congressional intent, NCRC, our member organizations and allies believe that merger reviews must give full and consistent consideration to the community impacts of any potential merger—that is, to the “convenience and needs” criteria that agencies have for too long overlooked. In doing so, the federal agencies should require cost-benefit analyses in the merger context and should mandate that community benefits commitments and public hearings become required steps in the merger application process. These community benefit commitments must include measurable and verifiable increases in loans, investments and services, subject to rigorous and standardized agency review.

Further, we recommend that the FDIC strengthen and modernize its merger review framework to ensure that impacts on competition are more accurately assessed, that there is fuller

¹ FDIC Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions (March 31, 2022), <https://www.federalregister.gov/documents/2022/03/31/2022-06720/request-for-information-and-comment-on-rules-regulations-guidance-and-statements-of-policy-regarding>; see also Executive Order 14036, “Promoting Competition in the American Economy” (July 9, 2021).

accountability for consumer protection and fair lending considerations, and that concerns with systemic financial stability are given due weight.

I. All mergers should result in a benefit to the public.

- a. All mergers should result in a benefit to the public. Reviews should include a cost-benefit analysis of the impact to the public.
- b. All applications should include a community benefits plan for agency review.
- c. Community benefits agreements are the most effective way to capture the conveniences and needs of the public, and should be encouraged or required.
- d. Public hearings should be held for all mergers, but especially the largest ones.
- e. An outstanding CRA score does not constitute proof that a new combination will meet the conveniences and needs of the public.
- f. Proof that a public benefit will result should be separate and distinct from the outcome of an assessment of its effects on competition.
- g. Coordination by prudential regulators with the CFPB, the Department of Justice, the Federal Trade Commission, and state financial regulators is essential to successful analyses of public benefits.

II. Reviews of the effect of a combination on competition should be expanded to include all aspects of the “business of banking.”

- a. Analyses focused only on deposit shares will omit impacts on lending, small business, and services.
- b. Consideration should be given to participation by non-banks in geographic markets.
- c. The agencies should reduce Herfindahl-Hirschman (HHI) thresholds.

III. Reviews of financial and managerial resources (the “safety and soundness prong”) should incorporate consideration of fair lending, consumer protections, compliance against illicit finance, and consumer complaints.

- a. Fair lending should be defined as a source of risk if a bank does not fully comply with fair lending laws.
- b. The agencies should consult the CFPB and give significant formal weight to its input, given that it supervises large banks for compliance with consumer protections and fair lending and maintains the consumer complaint database.

IV. Reviews of systemic risk must address the creation of new “too big to fail” institutions and compliance prevention against illicit finance.

- a. Recent approvals have led to new financial institutions that are “too big to fail.”

b. Mergers involving bank holding companies must consider the threats to systemic risk posed by entities within their organizations that are outside of the bank.

c. Merger reviews should condition approval on plans for resolution in the event of failure.

Summary: Most Mergers do not Benefit Communities due to Inadequate Consideration of the Four Statutory Factors for Merger Review

The Bank Merger Act, the Bank Holding Company Act and the Home Owners' Loan Act require regulators to consider four criteria when reviewing merger applications: the effect on competition, the needs and conveniences of the communities to be served (the "public benefit" criterion), the bank's financial and managerial strength, and the subsequent impact on financial stability for the industry as a whole. 12 U.S.C. 1828(c)

We believe that current agency reviews prioritize concerns related to anti-competitiveness and neglect the part of the framework that requires them to assess how a merger would impact the convenience and needs of communities. The ongoing failure of agencies to implement a meaningful convenience and needs review is reflected in evidence suggesting that most bank mergers have not created a public benefit, and in fact that communities are often harmed by mergers.

The bank sector has consolidated dramatically in the last decade, but little evidence exists to prove that the public has shared the benefits of merger approvals. By 2020, the United States had 4,375 commercial banks, almost half as many as in 2000.² As banks have dramatically increased in size in the wake of mergers, a large body of research has demonstrated that consumers often fare worse. Research demonstrates that when the level of bank concentration increases in a market, banks charge higher fees on deposit accounts³ and raise the cost of borrowing for retail loans.⁴ Lending, particularly small business lending, declines for several years after mergers involving large banks.⁵ All too often, merging banks take advantage of a less competitive landscape that they created by increasing their profits through price increases and reductions in service.

In order to ensure that mergers can benefit communities, the agencies' application of the four factors/prongs required by statute must include the following:

² Roison McCord, Edward S. Prescott, and Tim Sablik. "Explaining the Decline in the Number of Banks since the Great Recession." Federal Reserve Bank of Richmond, March 2015. https://www.richmondfed.org/publications/research/economic_brief/2015/eb_15-03.

³ Kress, J. C. (2020). Modernizing Bank Merger Review. *Yale Journal on Regulation*, 37, 64.

⁴ Ratnadiwakara, D., & Yerramilli, V. (2022). *Effect of Bank Mergers on the Price and Availability of Mortgage Credit* (SSRN Scholarly Paper No. 3695662). Social Science Research Network. <https://doi.org/10.2139/ssrn.3695662>

⁵ Xu, Y. (2018). *The importance of brick-and-mortar bank offices: Evidence from small business and home mortgage lending, 1998-2016* [Thesis, University of Delaware]. <https://udspace.udel.edu/handle/19716/23925>

I. Convenience and Needs Factor: Community impacts must be given due weight, and cost-benefit analyses and community benefits plans (CBPs) should be required.

Bank merger law provides that: “*In every case*, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, *the convenience and needs of the community to be served*, and the risk to the stability of the United States banking or financial system.” (Emphasis added.) The law requires that an agency must assess “the probable effect of the transaction in meeting the convenience and needs of the community to be served,”⁶ and further that an agency can only approve an anti-competitive merger when “it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.” In other words, the federal bank agencies should in all cases only approve mergers when banks can demonstrate that they will better serve community needs.

Instead of assuming mergers will confer benefits, the agencies should expect that most mergers will harm communities unless affirmative steps are taken to ensure that the merger will result in a benefit to the public. The agencies should regulate according to such a presumption.

a. Reviews should include a cost-benefit analysis of the impact to the public.

A cost-benefit analysis assessing the banking and lending landscape before and after the merger in affected markets will aid the agencies in assessing the impacts of the merger, the sufficiency of the CBP or CBA, and the performance by the management of the new combination to meet their commitments to the public. A cost-benefit approach will provide a transparent public mechanism to inform the agency’s assessment as to whether the merger should move forward, and whether CBPs or CBAs are sufficient or whether the agencies need to take additional steps to preserve robust and equitable markets after mergers. The regulatory framework must include clear performance standards and strong accountability mechanisms. The agencies’ assessments of mergers’ impacts on meeting community needs will be much improved if a cost-benefit analysis is required and if a community benefit plan (CBP) or a community benefit agreement (CBA) are regular features of the merger process.

b. All applications should include a CBP for agency review.

A CBP should be required as a part of all merger applications. The CBP would include public input and be subject to agency review. CBPs must be required for all mergers and the agencies should also encourage banks to negotiate CBAs. 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.

c. Community benefits agreements are the most effective way to capture the conveniences and needs of the public, and should be encouraged or required.

⁶ Federal Deposit Insurance Act Section 18(c)(5)(B) 1

A CBA is like a CBP but is negotiated among merging banks and community-based organizations.⁷ The agencies should encourage CBAs because research shows that CBAs have increased bank lending and reinvestment activity after mergers over the ensuing three or more years.^{8 9}

d. Proof that a public benefit will result should be separate and distinct from the outcome of an assessment of its effects on competition.

Since the redesign of antitrust law in the 1980s,¹⁰ the agencies' substantive review of public benefits has been predicated on a perceived threat to competition. Competition became a lens through which to evaluate public benefits, where an assessment of consumer welfare was measured through competitiveness in pricing, and pivoted to a framework where markets were assumed to be self-correcting and thus rectification could occur without government intervention.¹¹ Since then, analysis of competition within merger reviews has hinged on single technocratic lens. The benefit to the public became predicated on the level of competition. Unless an HHI analysis suggested that a merger would dramatically reduce competition, regulators would be able to sidestep a thorough assessment of a public benefit.¹² The original approach, as set out by the Brandeis court, was ignored. Reviews that took on a nuanced survey of non-financial ramifications such as political independence, entrepreneurship, or the rights of labor, became uncommon. The emphasis on efficiency in markets undermined important considerations of the effects of size on markets.¹³

e. Regulators should take input from other agencies. Coordination by prudential regulators with the CFPB, the Department of Justice (DOJ), the Federal Trade Commission (FTC), and others is essential to successful analyses of public benefits.

Reviews should consider the records of applicants in complying with consumer protection laws. However, with the passage of the Consumer Financial Protection Act, authority over many of these laws and their implementing regulations shifted to the CFPB. In spite of that shift,

⁷ NCRC. (2022, February 24). *NCRC and Cadence Bank Announce \$20.7 billion Community Benefits Plan* » NCRC. <https://www.ncrc.org/ncrc-and-cadence-bank-announce-20-7-billion-community-benefits-plan/>

⁸ Raphael Bostic & Breck Robinson. (2003). Do CRA Agreements Influence Lending Patterns? *Real Estate Economics*, 31(1), 23–51.

⁹ Casey, C., Farhat, J. B., & Cartwright, G. (2017). *Community Reinvestment Act and Local Governance Contexts: Advancing the Future of Community Reinvestment?* (SSRN Scholarly Paper No. 3010118). Social Science Research Network. <https://papers.ssrn.com/abstract=3010118>

¹⁰ Review of The Antitrust Paradox. (1979). *The International Lawyer*, 13(1). <https://www.jstor.org/stable/40705928>

¹¹ 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>

¹² Mitria Wilson. (2013). Protecting the Public's Interests: A Consumer-Focused Reassessment of the Standard for Bank Mergers and Acquisitions. *The Banking Law Journal*, 130(4), 350–378.

¹³ Khan, L. (2018). The New Brandeis Movement: America's Antimonopoly Debate. *Journal of European Competition Law & Practice*, 9(3), 131–132. <https://doi.org/10.1093/jeclap/lpy020>

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 power to collect important data on the consumer experience. Already, the CFPB collects data points through its consumer complaint database portal and as a function of its Home Mortgage Disclosure Act efforts. Soon, it will gather data on small business credit.

A true interagency effort is the best approach. In addition to the CFPB, reviews should take input from the Federal Trade Commission, the Department of Justice, and other institutions with the authority to supervise banking-related activities. Reviews should not be limited to federal regulators, but should also capture inputs from state financial regulators, state Attorney's General, and courts.

II: Anti-Competitive Factor: Reviews of the effect of a combination on competition should be expanded to include all aspects of the “business of banking.”

Regulators consider how a combination will change the level of concentration of deposits but have not considered the impact to other aspects of the business of banking or upon certain segments of customers in an area.

Since the passage of the National Bank Act, the business of banking has consisted of lending, deposit-taking, and payments. To meet the definition of a bank, an institution has been expected to offer all of these activities.¹⁴

Even if deposit shares are not concentrated as a result of a merger, some customers may be negatively impacted. For example, a merger could result in the reduction in the number of institutions that offer small business loans and treasury services. Similarly, access to small-dollar credit or mortgage loans could shrink. Reviews must take this into account. Finally, as discussed below in the answer to question 6, Herfindahl-Hirschman Index (HHI) thresholds must also be lowered.

III. Financial and Managerial Strength Factor: Reviews of financial and managerial resources (the “safety and soundness prong”) should incorporate consideration of fair lending, consumer protections, and compliance against illicit finance.

The agencies could also increase their use of conditional merger approvals in cases when the merging banks need to rectify weaknesses in fair lending and CRA performance. In cases in which CRA and fair lending performance might be barely sufficient or declined since the last exams, it could be necessary to supplement a CBP or CBA with a conditional merger approval. Agencies should consult with the Consumer Financial Protection Bureau (CFPB) to incorporate the CFPB's expertise in fair lending and consumer protection in merger reviews, to inform approvals including conditional ones.

¹⁴ Brendan Pedersen. (2021, October 13). Is modernizing National Bank Act the answer to fintech charter woes? *American Banker*. <https://www.americanbanker.com/news/is-modernizing-national-bank-act-the-answer-to-fintech-charter-woes>

Reviews should consider compliance to prevent illicit finance. To allow combinations that expand the asset size of institutions that have not adequately addressed money laundering, for example, will undermine safety and soundness. Similar reviews should consider compliance with Bank Secrecy Act, the Anti-Money Laundering Act, the Bank Secrecy Act, and Office of Foreign Asset Control rules. Conditional merger approvals must involve these aspects of compliance as well when necessary.

IV. Financial Stability Factor: Reviews of financial stability and systemic risk must address the creation of new “too big to fail” institutions.

The agencies must also significantly improve their application of the financial stability prong to ensure that institutions merging do not present systemic risks to the banking sector. Stress tests should be employed to ensure that the resulting institutions can withstand economic shocks such as recessions. The prudential regulators charged with merger review should consult other agencies operating alongside them in monitoring for illicit finance including the Financial Stability Oversight Council and the US Department of the Treasury. In addition, the agencies should ensure that institutions can be resolved and unwound without damaging the economy in event of failure.

This comment will now answer the FDIC questions posed in the RFI.

Responses to FDIC questions

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

As described above, the agencies have been preoccupied with the anti-competitive factor and fixated on HHI analysis. While an important consideration, conventional HHI analysis and the remediation of branch divestitures do not alleviate reductions in bank lending and services, particularly in underserved communities after mergers. Thus, branch divestitures often fail to deliver the public benefit required by banking merger law.

A dominant free-market orientation has guided the regulatory agencies when they evaluate whether to approve mergers. All too often, an assumption is that increases in bank size will realize “economies of scale;” the resulting efficiency gains will be passed onto the consumers in the form of lower prices and more lending.¹⁵ Instead, communities often experience the reverse - price hikes accompanied by less lending and more branch closures.

Requiring cost-benefit analyses and CPBs and encouraging CBAs as a means of prioritizing convenience and needs

Instead of relying on branch divestitures or economies of scale as antidotes to the ill effects of mergers, the agencies should prioritize the convenience and needs factor. They should require cost-benefit analyses as a key threshold component of merger assessments, and should require

¹⁵ Heyer, K. (2014). Consumer Welfare and the Legacy of Robert Bork. *The Journal of Law and Economics*, 57(S3), S19–S32. <https://doi.org/10.1086/676463>

CBPs for all mergers while also encouraging CBAs. These commitments would address reinvestment activity in all geographical areas served by banks.

The correct public benefits cost-benefit analysis approach would exclude benefits provided to merger applicants in its calculation. It would only capture the costs and benefits of a merger to the public. The factors would include likely changes in access to financial services. Consideration should take the shape of clearly quantitative measures and would occur in a transparent fashion.¹⁶ However, in merger reviews for larger combinations, reviews would consider factors outside of the direct provision of banking services. These factors would include the effect on entrepreneurship, the rights of labor, and other concerns first outlined by the Brandeis school.¹⁷

CBPs and CBAs overcome a significant shortcoming of merger review. Most merger reviews receive few comments from the public. By contrast, CBPs and CBAs necessarily involve input from the public (as well as incorporating strong agency standards for goal setting as discussed below in question 5). Such involvement ensures that merger reviews will proceed with an understanding of the conveniences and needs of the public, permitting agencies to benefit from local knowledge, and expanding the review to consider a greater range of products and services.

In some cases, current merger approval orders have recognized CBAs but in other cases, a familiar footnote in the order appears saying these are not required.¹⁸ We believe that CBAs are consistent with and further the purposes of bank merger law. We urge the agencies to discard the counter-productive footnote in approval orders and embrace CBAs as an important tool ensuring public benefit.

NCRC urges the agencies to encourage CBAs in all merger applications, but particularly in the largest mergers involving combined assets of more than \$10 billion,¹⁹ since the largest mergers are the ones most likely to negatively impact the public through price increases, lending declines or other adverse effects, and large acquisitions may present increase systemic risk.²⁰ By encouraging CBAs, regulators will ensure that banks make commitments to meet the conveniences and needs of the public.

The CBPs or CBAs would use performance measures similar to those on CRA exams for committing the merging banks to exceed the performance of their peers as described in more detail below (see response to Question 5). The agencies can implement a CBP requirement in a

¹⁶ Mitria Wilson. (2013). Protecting the Public's Interests: A Consumer-Focused Reassessment of the Standard for Bank Mergers and Acquisitions. *The Banking Law Journal*, 130(4), 350–378.

¹⁷ Khan, L. (2018). The New Brandeis Movement: America's Antimonopoly Debate. *Journal of European Competition Law & Practice*, 9(3), 131–132. <https://doi.org/10.1093/jeclap/lpy020>

¹⁸ Mitria Wilson. (2013). Protecting the Public's Interests: A Consumer-Focused Reassessment of the Standard for Bank Mergers and Acquisitions. *The Banking Law Journal*, 130(4), 350–378.

¹⁹ National Community Reinvestment Coalition. (2020, October). *NCRC Comment on DOJ Merger Reviews*. <https://ncrc.org/wp-content/uploads/2020/10/Final-NCRC-Comment-on-DOJ-merger-review-guidelines.pdf>

²⁰ Xu, Y. (2018). *The importance of brick-and-mortar bank offices: Evidence from small business and home mortgage lending, 1998-2016* [Thesis, University of Delaware]. <https://udspace.udel.edu/handle/19716/23925>

manner similar to the CRA strategic plan option. The CRA regulations require banks to informally and formally solicit public input into a strategic plan;²¹ likewise, merger regulations could mandate public input into the development of CBPs.

In addition to CBPs and CBAs covering all geographical areas, the plans will need to ensure public benefits in geographical areas experiencing high concentration levels after mergers for banks of any size. A point of intersection between the anti-competitive and convenience and needs analysis points toward a creative and effective approach: to not only require branch divestitures in geographical areas with high concentration levels post-merger but also require special sections in CBPs and CBAs setting goals specifically for geographical areas with high concentration levels.

Branch divestitures alone will not be effective in addressing post-merger shortfalls in lending and service, particularly in the case of large bank mergers. There is no guarantee that the bank acquiring the branches will increase lending and service since that bank has no obligation to do so as a condition of acquiring the branch. In contrast, when the branch divestiture is accompanied by a requirement to benefit the affected communities via a CBP or CBA, lending, community development financing and services will increase since the CBP or CBA commits the merging banks to do so.

The agencies should enforce CBPs and CBAs in two main ways: an independent review (not in conjunction with a CRA exam) at the expiration of the CBP or CBA term and also on CRA exams. If a bank has failed to comply with the goals at the end of the term of the CBP or CBA, the agency's review should mandate that a bank cannot merge or be acquired until this failure is rectified through the creation of another CBP and compliance with that CBP's goals. The agencies should post the results of their independent reviews on their websites. In addition, CRA exams should review CBP goal compliance and downgrade if a bank falls far short of goal attainment or could boost a rating if the bank has not only met but has significantly exceeded the plan's goals.

Bank merger law requires the public benefit to exceed the adverse impacts of a merger, particularly when markets become less competitive. The adverse impacts are likely to be greater in the largest bank mergers due to the creation of less competitive markets in several geographical areas. Therefore, the public benefit must exceed the adverse impacts by a greater extent the larger the merger is. The agencies, therefore, must have greater expectations and requirements for CBPs and CBAs involving the largest banks.

Public hearings must become more frequent and public input must be maximized

Another shortcoming of the current convenience and needs analysis is the rare use of public hearings during merger proceedings. The agencies application of the four statutory factors of

²¹ 12 CFR Part 345.27 (d)—Community Reinvestment. (n.d.). [Code of Federal Regulation]. Retrieved May 24, 2022, from <https://www.ecfr.gov/current/title-12/chapter-III/subchapter-B/part-345>

merger review has therefore been impaired by the lack of consideration of the full impact of the mergers on the public which hearings can further illuminate.

Hearings occur infrequently, once every few years. However, during the pandemic, the agencies held some virtual hearings which demonstrated the feasibility and usefulness of this platform for maximizing the input of the public, especially when large bank mergers involve several states. It would not be difficult for the agencies to dedicate staff and hold virtual hearings a few days after the expiration of the public comment period (holding the hearings after the expiration of the comment period would allow witnesses and the agencies to read written comments and better prepare themselves for the hearing).

The agencies must make improvements to the virtual hearing format. We understand from our member organizations that in recent hearings, logistical difficulties impeded broad-based participation. The agencies used a platform that not everyone from the public had familiarity with, the agencies required attendance to a mini-orientation at little notice, and members of the public remained on “hold” while going through a technology check. These difficulties resulted in some members of the public not being able to participate in the hearing despite their desire to do so. The agencies should improve the ease of the virtual hearing process and facilitate attendance from a wide diversity of stakeholders including people with disabilities.

The agencies would better understand how to analyze the convenience and needs factor if they maximized public input and allowed for more oral testimony. This would empower more stakeholders to offer input including members of the public not inclined to offer written testimony. It would offer the agencies more information and insights into how access to bank loans and services could be impacted differently across localities with various economic conditions and demographics.

If hearings are not automatic on all mergers, they should be automatic for mergers involving banks with combined assets above \$10 billion and in mergers where anti-competitive impacts are significant in various geographical areas, possible branch closures could be considerable, or CRA and fair lending performance is poor in a significant number of assessment areas. On-site hearings must also be held in those impacted areas in addition to the virtual hearing for stakeholders in the entire bank footprint.

Regarding hearings, we are pleased the Acting Comptroller Hsu recently stated:

In recognition of the value that public input can provide on mergers, the OCC is considering options to facilitate such input. For example, for mergers involving larger banks, the OCC is considering adopting a presumption in favor of holding public meetings. We partnered with the Federal Reserve to hold a public meeting in March for the proposed U.S. Bank and MUFG/Union bank merger. Over 120 community members

attended and shared their views on the needs of the community and how they may be impacted by the merger.²²

More transparency is required in order for the agencies to properly consider the statutory factors required for merger reviews. Pre-merger application discussions between a bank and an agency can occur, sometimes to a considerable extent.²³ Documents and emails during this time period should be available for public inspection in order to prevent improprieties such as inappropriate agency coaching of a bank that would facilitate merger approval. In addition, these discussions often have direct bearing on how the agency and the bank considered the statutory factors, to which the public should have access when formulating their comments.

Agency websites must be vastly improved so the agencies can benefit from more public input informing the convenience and needs factor. On the agency websites, there should be a button prominently on the home page that can be clicked to allow a reader to learn which bank applications are subject to public review and comment. After the reader clicks the button, the reader should be directed to another page that includes clear instructions as to how to comment, who to contact should the reader have questions and a public record of all agency decisions on bank applications.

Currently, the agencies are inconsistent in how they inform the public via their websites of bank applications. Previously, the FDIC had a button on their home page directing the public to information about applications subject to public comment, but this button has disappeared. As a result, the ability of the public to figure out how to comment on mergers is difficult when navigating the FDIC website.

Navigating the Federal Reserve and Office of the Comptroller of the Currency (OCC) websites are also hard. Once a reader can find the merger section of the Federal Reserve's website, instructions are clearer about how to comment (including how to contact) than the other agency websites. The Federal Reserve also has a publicly available section of its website for retrieving orders on bank applications which the OCC does not have (except for a few decisions it deems to be of interest to the public) and the FDIC has a section only regarding applications for deposit insurance.

The OCC makes it relatively easy to retrieve bank applications in PDF form on its website while the other two agencies make a user contact them to receive an email with the application. The speed via email of acquiring the application varies, which can effectively shorten the time by several days for a member of the public to read the application and comment on it during the public comment period. Therefore, the OCC method of providing applications to the public should be adopted by the FDIC and Federal Reserve Board.

²² Michael J. Hsu. (2022, May 9). *Acting Comptroller of the Currency Michael J. Hsu Remarks at Brookings "Bank Mergers and Industry Resiliency."* <https://occ.gov/news-issuances/speeches/2022/pub-speech-2022-49.pdf>

²³ Georgia Kromrei. (2022, March 29). *Inside the government's feeble fight to end redlining.* *Housing Wire.* <https://www.housingwire.com/articles/inside-the-governments-feeble-fight-to-end-redlining/>

Finally, the agencies are inconsistent regarding how to submit comments. For example, some Federal Reserve Banks allow for email or snail mail submission of comments while others only allow snail mail submission of comments. Within and across agencies, the commenting process must be made uniform and involve both email and snail mail options in order to facilitate comments from a wide variety of public stakeholders.

The merging banks should also be required to post their applications and notices of their applications on their websites as a means of informing the public in a timely manner. Other agencies require this. In 2020, for example, the FCC updated its public notice requirements for broadcast station applicants, requiring the applicant to “conspicuously post [the notice] on an internet website” operated by the applicant or an affiliate.²⁴

A merger application notice triggers a 30-day comment period. However, in some cases, delays in accessing the application from the federal bank agency can effectively reduce the comment period by a week to two weeks (in one case, for example, the FDIC website was not working properly so an email request from NCRC to the FDIC for a copy of the application was not acted upon for a week or two). Either the agencies need to improve their dissemination of applications or start the clock on the comment period only when a member of the public can actually access the application.

In short, the agencies must all improve their websites to facilitate public input in the convenience and needs factor. This will better enable the agencies to execute their statutory responsibilities to consider merger applications in a fair manner that is more likely to benefit communities.

Record of compliance and too big to fail considerations must be considered more carefully

The agencies should be concerned when an acquiring institution has a record of failing to implement proper compliance procedures. Reviews should place skepticism when reviewing an application from a bank that has been the subject of enforcement actions for failure to comply with the Bank Secrecy Act or the Anti-Money Laundering Act, for example. Relatedly, the applicability of compliance with either of these laws underscores how FinCEN should have a role in reviews led by prudential regulators. If an institution is already failing to monitor its existing activities, it stands to reason that an expansion would create new challenges and portend greater risks.

Agencies should be particularly cautious when a merger could create a new “too big to fail” institution. Four acquisitions of target banks with more than \$100 billion in assets have been approved or filed since 2020.²⁵ These approvals test the criterion that merger reviews ensure that applications do not lead to systemic risk.

²⁴ Federal Communications Commission. (2020, June 18). *Filing of Applications; Modernization of Media Regulation Initiative; Revision of the Public Notice Requirements*. Federal Register. <https://www.federalregister.gov/documents/2020/06/18/2020-11127/filing-of-applications-modernization-of-media-regulation-initiative-revision-of-the-public-notice>

²⁵ Kevin Wack. (2022, March 17). The biggest bank M&A deals of the last decade. *American Banker*. <https://www.americanbanker.com/list/the-biggest-bank-m-a-deals-of-the-last-decade>

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

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

In a recent academic article, Jeremy Kress suggests:

Strengthening the “well capitalized” threshold would ensure that firms are permitted to expand only if they hold significantly more financial resources than is expected of non-merging companies, consistent with congressional intent. Moreover, for larger firms that would be subject to stress tests on consummation of a merger, the Federal Reserve should conduct a stress test of the pro forma balance sheet as part of the merger application to assess how the consolidated firm would perform during a downturn. This dynamic, forward-looking exercise would ensure that the Federal Reserve evaluates the firm’s “future prospects,” as required by the BHC Act.²⁶

We agree with Kress’ stress testing recommendation as a forward “future prospects” approach required by bank merger law.

As a condition of approval involving institutions where systemic risk management problems have occurred, regulators should confirm that both institutions have effective audit committees, whistle-blower protection programs, procedures for external audits, and certification processes for third-party relationships.

Combinations resulting in larger institutions – and particularly those that approach “too big to fail” stature – deserve to have to meet higher standards for safety and soundness. Accordingly, such combinations should be expected to have stronger risk-based capital ratios. Merger reviews should utilize stress tests for larger institutions and for institutions whose activities can be considered to be more complex. For example, mergers of bank holding companies whose balance sheets include derivatives, hedging instruments, and exposure to highly cyclical asset classes should be considered to be “high risk” and deserving of stricter reviews for systemic risk. These standards honor the requirement in the Bank Merger Act to consider the impact of any merger on systemic risk.

²⁶Kress, J. C. (2020). Modernizing Bank Merger Review. *Yale Journal on Regulation*, 37, 64.

We also caution the agencies to ensure that they do not deem CRA-related activities or banks that excel at CRA to be riskier than other banks. Quantitative measures should be careful not to artificially accentuate the risks of bread and butter CRA lending and investing. The “plain vanilla” version of banking (as described by Representative Barney Frank in 2009),²⁷ where traditional banks use deposits to engage in prime lending, payments, other low-risk activities (which are the core of CRA activities) are generally considered not to pose risk.

Merger reviews should reject applications when a new combination would result in a single institution having more than thirty percent of deposits in a market or more than ten percent in the entire country, as required by the Riegel-Neal Interstate Banking and Branching Efficiency Act.²⁸ At the end of 2021, two banks held more than 11 percent of US deposits each²⁹ – a clear example of how banks have been allowed to grow beyond the intent of banking law.

Enforcement of the deposit limits must be reinstated to preserve competition and ensure that a bank does not pose undue risks by having a disproportionately large portion of the nation’s deposits and liabilities.

Question 4a. To what extent should the convenience and needs factor be considered in acting on a merger application? Is the convenience and needs factor appropriately defined in the existing framework? Is the reliance on an insured depository institution’s successful Community Reinvestment Act performance evaluation record sufficient? Are the convenience and needs of all stakeholders appropriately addressed in the existing regulatory framework?

The agencies must dramatically elevate the importance of the convenience and needs factor in their assessment framework, since banking law requires that mergers confer a public benefit. Despite this legal mandate, a large body of research has revealed unequal impacts of the large numbers of mergers over the last few decades. Specifically, traditionally undeserved communities have borne the brunt of the harmful impacts of mergers, including price increases and decreases in service levels. While CRA exams are an important consideration in merger reviews, they cannot adequately consider the totality of the impacts of mergers, in part because they are often dated and cannot assess the impacts of the institutional changes a bank undergoes during a merger. A holistic cost-benefit analysis based on transparent agency standards must inform the convenience and needs review, and will enable to agencies to assess whether a merger should move forward and whether the CBP the bank puts forth is sufficient.

Dramatic consolidation and branch closures disproportionately impact communities of color, rural areas and economically disadvantaged communities

²⁷ McGrane, V. (2009, September 21). *Frank backs consumer watchdog plan*. Politico. <https://www.politico.com/story/2009/09/frank-backs-consumer-watchdog-plan-027405>

²⁸ Board of Governors of the Federal Reserve. (1994, September). *Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994*. Federal Reserve History. <https://www.federalreservehistory.org/essays/riegle-neal-act-of-1994>

²⁹ Statista. (n.d.). *U.S.: Market share of banks by deposits 2021, by value of domestic deposits*. Statista. Retrieved May 20, 2022, from <https://www.statista.com/statistics/727546/market-share-of-leading-banks-usa-domestic-deposits/>

The banking sector has consolidated dramatically in the last decade, but little evidence exists to prove that the public has shared the benefits of those merger approvals. By 2020, the US had 4,375 commercial banks, almost half as many as in 2000.³⁰ The overall number of bank branches has declined significantly in the last decade.³¹ Banks closed 2,927 branches in 2021 and 2,126 in 2020. To underscore the disconnect between the expressed will of Congress in the Bank Merger Act, the Federal Reserve did not reject a merger application between 2006 to 2017, despite evidence from research that mergers often harm communities.³²

Specific 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.³³

Despite the amendment of bank merger law to include convenience and needs considerations, the banking industry has not significantly reduced fees and other costs of basic banking services, which has prevented millions of underserved people from fully using the banking system. For example, mergers did not reduce the price for overdraft fees, and in fact, most institutions have raised the overdraft fees even though automation electronic payment systems have lowered operational costs in deposit services.³⁴ To the extent that new demand deposit accounts without overdraft fees entered the market, they were offered by new neobanks (issuers of digital branchless demand deposit accounts) that entered the market as startups and not within 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,³⁵ and only a few banks offer meaningful small-dollar credit products at scale. In areas where a large bank purchases a small bank, bank deposit

³⁰ 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

³¹ Fee, K., & Tiersten-Nyman, E. (2021). Has Bank Consolidation Changed People's Access to a Full-Service Bank Branch? *Community Development Briefs*. <https://www.clevelandfed.org/newsroom-and-events/publications/community-development-briefs/db-20211006-has-bank-consolidation-changed-peoples-access>

³² Chairman Jerome Powell. (2018, May 10). *Powell Response on Banker Mergers to Sen. Elizabeth Warren*. <https://www.warren.senate.gov/imo/media/doc/Powell%20Response%20re%20Mergers.pdf>

³³ 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>

³⁴ 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>

³⁵ 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>

accounts become less affordable and the number of check cashing and other non-bank financial service providers increases.³⁶

The need for a thorough cost benefit analysis assessing impacts on the public

The agencies should clarify that mergers must meet the criterion of realizing a public benefit, meaning that its benefits to the public must exceed adverse effects created by the merger. The agencies should determine the qualitative and quantitative scope of products and services offered in a community prior to a merger as a baseline for assessing the impact of a merger, review the plans outlined by applicants, and construct a cost-benefit analysis of the impact on the public. The cost-benefit analysis needs to consider the expected scope of products and services offered in the community post-merger compared to pre-merger. If there is not a net benefit, the application should be returned and the applicants should be asked to develop plans that align with the public interest.

Regardless of the degree to which mergers benefit the banks, the public benefits statutory provision applies not only to mergers with potential anti-competitive impacts but to all mergers. The Bank Merger Act mandates that a federal bank agency shall not approve a merger transaction:

Whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, the convenience and needs of the community to be served, and the risk to the stability of the United States banking or financial system.³⁷

This statutory language makes it clear that Congress intended that mergers must benefit the public.

These practices must change. The process of merger review must be redefined to prioritize the public benefits criterion, even in cases where effects on competition do not lead to a significant increase in the HHI index.

Merger reviews among large institutions may undermine the public in ways that go beyond their access to banking services and products. Banking is unique among industries in that it acts as an intermediary between the government and commerce. Underwriting is left up to financial

³⁶ Bord, V. M. (2018). Bank Consolidation and Financial Inclusion: The Adverse Effects of Bank Mergers on Depositors. *Harvard Business School*, 89.

³⁷ Federal Deposit Insurance Act. Sec 18. Regulations Governing Insured Depository Institutions, Pub. L. No. 797 (1950). <https://www.fdic.gov/regulations/laws/rules/1000-2000.html#fdic1000sec.18c>

institutions, and as a result, banks have considerable influence across the entire economy. Allocation of credit may have downstream effects on entrepreneurship, the rights of labor, retirement security, and political freedoms, among many factors.³⁸ As conceived by Brandeis, these impacts had weight in merger review. To rightfully consider the impacts to the public of a merger, regulators should restore consideration to how a merger could have economic and sociological impacts beyond the provision of banking services. Moreover, the test of public benefits must be higher for applications that would result in very large banks.

Convenience and needs analysis cannot just consider CRA exams

The merging banks' CRA and fair lending records are important parts of a convenience and needs review but cannot be the sole or primary factor in convenience and needs review. CRA and fair lending reviews can provide indications of future performance in meeting convenience and needs but the information on CRA exams would be incomplete by itself.

- Firstly, CRA exams can be two or three years old. Since the CRA exam, a bank's product offerings and marketing strategies may have changed in such a way as to significantly impact its future CRA and fair lending performance.³⁹
- Secondly, a merger can significantly change the institutional structure of the resulting bank and can make CRA decision-making more centralized or decentralized. In cases when decision-making becomes more centralized, the bank can become less responsive to geographical areas far away from its main office. An analysis of CRA exams in the past cannot account for this.
- Third, many institutions are active outside of their assessment areas, and as a result, CRA exams do not capture the full scope of their impacts.
- Fourth, short of instances when there is a record of a fair lending problem, CRA exams do not make qualitative judgments about a bank's activities. For example, as currently structured, CRA exams do not consider if a bank charges excessive "junk" fees, if it derives a high share of revenue from overdraft, or if it uses its charter to evade state interest rate caps.

All of these factors deserve consideration in a merger review and would be impossible to detect if the analysis of public benefits was limited to the CRA performance evaluation.

Since the public benefit requirement mandates an analysis of the future ability of a bank to meet convenience and needs, scrutiny of a bank's CRA exam must be supplemented by an analysis of a concrete plan submitted as part of a merger application – the cost-benefit analysis, CBP, and CBA framework we discuss above. Such plans are necessary in order for the agencies to properly assess whether increases in loans, investments and bank services will benefit the

³⁸ Khan, L. (2018). The New Brandeis Movement: America's Antimonopoly Debate. *Journal of European Competition Law & Practice*, 9(3), 131–132. <https://doi.org/10.1093/jeclap/lpy020>

³⁹ This whitepaper found that CRA exams for most the largest banks covered activities that were between two and three years old. Josh Silver, *An Evaluation of Assessment Areas And Community Development Financing: Implications For CRA Reform*, NCRC, July 2019, <https://ncrc.org/an-evaluation-of-assessment-areas-and-community-development-financing-implications-for-cra-reform/>

community in the future, and to provide future accountability. Research has demonstrated that mergers can decrease lending for several years in the future.⁴⁰ CBPs or CBAs should therefore be multi-year commitments in order to ensure more reinvestment activity for future time periods. We affirm our earlier views that all merger applicants should have to bear a burden of proof that a merger would create a public benefit, that consumers should have access to the data used by reviewers, and plans made by regulators to supervise and enforce a CBA.⁴¹

Some stakeholders assert that “Outstanding” CRA ratings should provide an automatic safe harbor or presumption of merger approval.⁴² This is problematic for a number of reasons including dated CRA exams from two or more years in the past. Such a safe harbor would also not account for the likelihood that CRA performance could be poor in some areas, especially underserved smaller cities and rural areas. A safe harbor would not provide incentives for banks to address unevenness in performance with concrete CBPs or CBAs. Finally, a safe harbor would fail to account for possible institutional changes that could impact future CRA performance. Moreover, a CRA performance evaluation is necessarily backward-facing.

A safe harbor is the incorrect incentive to provide banks for striving towards Outstanding ratings. It is not needed since a significant segment of banks already strive for the highest rating out of concern for their communities and/or to improve their public reputations. If the agencies want to provide an incentive for banks to earn Outstanding ratings, they could consider lowering FDIC insurance fees or other fees while increasing fees for banks that do not rate Outstanding.⁴³

Question 4b. To what extent and how should the convenience and needs factor take into consideration the impact that branch closings and consolidations may have on affected communities?

Some mergers involving large banks have led to large numbers of branch closures. For example, there are 119 branches of MUFG Union Bank located within a mile of an existing US Bank branch. The merger of these institutions should result in a significant depletion in the number of bank branches in the communities impacted by the merger. These closures must receive elevated scrutiny under convenience and needs analysis since consumers and small businesses in lower income communities rely on branches to guide them through the banking and lending processes.

⁴⁰ This paper finds that declines in small business lending after mergers and branch closures can persist up to six years, similar to the findings of Yichen’s paper discussed above: Nguyen, Hoai-Luu Q. 2019. "Are Credit Markets Still Local? Evidence from Bank Branch Closings." *American Economic Journal: Applied Economics*, 11 (1): 1-32. <https://www.aeaweb.org/articles?id=10.1257/app.20170543>. The Ratnadiwakara study cited above suggested that interest rate increases on mortgage lending can persist for up to six years.

⁴¹ Mitria Wilson. (2013). Protecting the Public’s Interests: A Consumer-Focused Reassessment of the Standard for Bank Mergers and Acquisitions. *The Banking Law Journal*, 130(4), 350–378.

⁴² Kress, J. C. (2020). Modernizing Bank Merger Review. *Yale Journal on Regulation*, 37, 64.

⁴³ Illinois Department of Financial and Professional Regulation Illinois Community Reinvestment Act: Advance Notice of Proposed Rulemaking, p. 3, August 31, 2021, <https://www.idfpr.com/News/2021/2021%2007%2020%20IL%20CRA%20Advance%20Notice%20of%20Proposed%20Rulemaking%20Outline.pdf>

The impact felt by a household or small business from a branch closure is a factor of the breadth and depth of the banking needs of those individuals. Needs vary among individuals and communities; those with unique service needs are the ones most likely to suffer from a merger.

Unfortunately, merger reviews use deposit services as the primary unit of analysis, based on an implicit assumption that the needs of depositors are homogenous, and to the exclusion of other aspects of the business of banking. The narrow focus on deposits blithely ignores that the deposit services needs of small businesses vary considerably from those of individuals.

An analysis of benefits and costs should consider effects on availability of all aspects of banking services for small businesses and farmers. In eastern North Carolina, for example, branch closures have elicited the strongest objections from small business owners who want a nearby location to make nightly deposit drops or who depend on flexible credit policies.⁴⁴

Applications by non-banks to buy depositories present a particular challenge to assessment, as they are likely to disrupt the availability of banking services without changing the concentration of deposits in a community. In 2021, an online non-bank lender filed a change-in-control application to purchase a small bank in Utah. The applicant intended to shift the focus of the bank's lending from purchase loans for accessory dwelling units to online deposit accounts, personal loans, and credit cards. The target was the only provider of ADU loans in the area. To the extent that non-bank fintechs seek charters through change-in-control procedures, regulators will have to acknowledge the possibility for significant disruptions to prior retail banking relationships.

A broader assessment, rather than a sole HHI focus, would add clarity to the otherwise unstated impacts of branch closures or divestitures on convenience and needs and would undoubtedly reveal the harms presented by many proposed mergers.

Notably, few of the service reductions created by a potential merger could be remedied by the merging banks selling their branches. Long-term relationships established by the selling bank with small business owners and customers are not easily preserved by the bank buying the branches. Accordingly, remedies should not be limited to the divestiture of branches but should also consider the impact to the public in other aspects of banking. For example, an analysis of benefits and costs should consider effects to availability of services to small businesses, farmers, and household borrowers.

These banks must be expected to justify why large-scale branch closures are needed and how the merged banks would compensate in terms of serving communities experiencing the branch closures with loans and deposit accounts. Vague promises of online service delivery would not be sufficient. Instead, descriptions of marketing approaches and partnerships with nonprofit organizations and other stakeholders should be detailed enough for the public to assess the likelihood of success of the non-branch delivery strategies. In addition, CBAs and CBPs need to

⁴⁴ 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>

be especially rigorous and specific in these circumstances. Finally, the community should have ample opportunities through comment periods and public hearings to explore alternatives to branch closures with the merging banks.

NCRC and our members have recently commented on merger applications of very large banks that have sizable numbers of their branches within one mile of each other. These applications are vague about how many branches might be closed or consolidated, making it difficult for members of the public to comment on the impact of the merger on access to banking services. The applications must be more forthcoming about possible branch closures and describe commitments regarding how to tailor closures or branching strategy for traditionally underserved communities.

Since modest income customers rely on branches to a greater extent than more affluent customers,⁴⁵ the merging bank could promise an exception to a general approach of closing overlapping branches within a mile of each other (or other specified distances) in the case of underserved communities. In addition, the bank could implement mobile banking branches, including accessible stops for customers with disabilities. The bank should also make sure that previous customers of any closed branch, particularly those with limited mobility or senior citizens, are aware of new services offered by the bank that facilitate access to services. Some banks have also agreed to place ATMs and bank staff in nonprofit organizations, paying rent to the nonprofit. Finally, some merging banks have agreed to open branches in underserved communities, including communities of color and LMI neighborhoods. Without concrete indications of how to mitigate adverse impacts of branch closures, the agencies must not let such applications proceed until they present more detailed strategies and develop CBAs or CBPs.

Question 4c. To what extent should the FDIC differentiate its consideration of the convenience and needs factor when considering merger transactions involving a large insured depository institution and merger transactions involving a small insured depository institution?

While the overall convenience and needs analysis will be similar, the CBA and CBP requirements will necessarily be different based on the capability and size of the institutions. Banks of all sizes can accommodate retail lending and service goals in a CBA or CBP. However, larger banks will have more complex community development financing goals involving equity investments in small businesses, economic development or affordable housing than smaller banks. Smaller banks can focus their plans on grants to community-based organizations including those lead by people of color that pursue community development. In addition, smaller banks can offer community development services in their plans. Larger banks, of course, should also offer grants and community development services in their plans but will generally be able to engage in more complex community development financing than smaller banks.

Regulators should consider how they would respond to an event when an online financial institution – either one that was already a depository or that sought to attain a charter through an

⁴⁵ Federal Deposit Insurance Corporation. (2019). *How America Banks: Household Use of Banking and Financial Services, 2019 FDIC Survey*. <https://www.fdic.gov/analysis/household-survey/index.html>

acquisition – purchases a small bank. Clearly, the public would suffer from the transaction. However, the online depository would not have the option of selling a branch.

Question 4d. To what extent should the CFPB be consulted by the FDIC when considering the convenience and needs factor and should that consultation be formalized?

Dodd-Frank transferred supervisory authority to the CFPB for several important consumer-facing laws. The CFPB has responsibility for the Equal Credit Opportunity Act, the Home Mortgage Disclosure Act, the Electronic Funds Transfer Act, and other laws (and associated implementing regulations). They examine supervised entities, demand information on occasion, and make enforcement actions. The CFPB should have the authority to prevent a merger.

As a part of that duty, the CFPB collects information that offers essential insights into the evaluation of the public benefits prong. Currently, information from CFPB enforcement and supervisory activities and data gathering support efforts for the creation of public benefits agreements, performance evaluations for state CRA activities, litigation, and prudential CRA performance evaluations. Collectively, these activities generate significant amounts of information that could be of use in a merger review.

With the transfer of supervisory authority for those laws to the CFPB, a fundamental disconnect arose that now insulates consumer compliance from bank merger reviews. The CFPB is charged with enforcing consumer protection compliance on institutions with assets of more than \$10 billion. Because they are not engaged in these activities on an ongoing basis, the prudential regulators lack the infrastructure to understand how an applicant has met consumer protection rules. True, the prudential regulators may seek input from the Bureau, but they are under no obligation to agree with the Bureau and still have the final authority for assessing consumer compliance in a review.⁴⁶

Prudential regulators must refer to evidence culled from the CFPB’s Consumer Complaint database, the Home Mortgage Disclosure Act database, and once it has been implemented, the records collected under Section 1071 of the Consumer Financial Protection Act.

Data collection privileges and regulatory supervisory powers that were once granted to prudential regulators, but which are now under the authority of the CFPB, were useful in merger reviews before the passage of the Consumer Financial Protection Act. For example, in 1970, the Federal Reserve did not approve the application of Totalbank on consumer protection grounds:

“The Board also notes that Totalbank's report of examination cites technical violations of the Equal Credit Opportunity, Home Mortgage Disclosure, and Fair Housing Acts. In addition, the Board has previously stated that disregard for consumer compliance provides a separate basis for concluding that the conveniences and needs considerations do not warrant approval for an

⁴⁶ Kress, J. C. (2020). Modernizing Bank Merger Review. *Yale Journal on Regulation*, 37, 64.

application, even if the applicant has a satisfactory record of performance under the CRA.”⁴⁷

In many instances, the CFPB is inarguably the only source for certain types of information that is necessary to fulfill a review of public benefits. The CFPB is charged with protecting service members and their dependents from harmful forms of credit. The CFPB maintains close relationships with Judge Advocate General’s offices and other officials in the Department of Defense. Information collected by the CFPB may be the only place where reviews could ascertain an applicant’s record of meeting the conveniences and needs of active-duty servicemembers.

Coordination by prudential regulators with the CFPB, the Department of Justice, the Federal Trade Commission, and state financial regulators is essential to successful analyses of public benefits

In fact, the role of the CFPB in protecting active duty servicemembers also highlights how a coordinated approach across many agencies is essential for merger reviews. While the CFPB ensures that active-duty servicemembers are protected by the MLA, the Department of Justice has a parallel role in enforcing the Servicemembers Civil Relief Act, which covers the treatment of pre-existing debts during times of activity duty. To fully capture the record of treatment of our military by an applicant, reviewers must work with multiple agencies. Reviews should take input from the Department of Justice, the Federal Trade Commission, and other agencies mentioned earlier in this answer.

Today, the prudential regulators have the right to solicit input from the CFPB, but are under no requirement that would compel them to do so.⁴⁸

In addition to the CFPB, NCRC urges the federal bank agencies to collaborate with each other when more than one is considering the same merger application. Combining public comments with those received by all agencies with joint oversight over merger reviews will facilitate a more meaningful, efficient review process. Collaboration among agencies is also strongly encouraged in a recent Executive Order, which provides that “when agencies have overlapping jurisdiction, they should endeavor to cooperate fully in the exercise of their oversight authority, to benefit from the respective expertise of the agencies and to improve Government efficiency.”⁴⁹

In one case, the OCC approved an application in the case of Wilmington Savings Fund Society (WSFS) merging with Bryn Mawr Trust Company (BMTC) while the Federal Reserve Board was still gathering information about the merger’s impacts. It is questionable that the OCC was able to fully consider the convenience and needs factor before waiting for all the information the

⁴⁷ Board of Governors of the Federal Reserve. (1995). *Federal Reserve Bulletin*. https://fraser.stlouisfed.org/files/docs/publications/FRB/1990s/frb_091995.pdf

⁴⁸ Kress, J. C. (2020). Modernizing Bank Merger Review. *Yale Journal on Regulation*, 37, 64.

⁴⁹ President Joe Biden, *Executive Order on Promoting Competition in the American Economy*, The White House, July 9, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

Federal Reserve gathered.⁵⁰ In another case, the FDIC imposed fair lending conditions on an application from Investors Bank to acquire branches from Berkshire Bank.⁵¹ Investors Bank was required to improve its lending to communities of color. Soon thereafter the Federal Reserve Board approved the application of Citizens Financial Group to acquire Investors but did not reconfirm the fair lending conditions of the previous FDIC order.⁵² These cases highlight the importance of interagency collaboration. Indeed, many federal agencies have “competition policy levers” designed to protect markets from monopoly power.⁵³

In addition to federal agencies that have supervisory authority for consumer protections and ensuring safety and soundness, reviews should consider evidence from state and municipal entities charged with doing analogous activities. Valuable evidence can be gathered from state Attorneys General, treasurers, banking departments, financial regulators, and courts, for example.

State CRA supervision and enforcement activity should also be considered. Increasingly, states and cities are enacting their versions of CRA-like public benefits statutes that go beyond federal requirements. Some are requiring reports on how financial institutions equitably and inclusively serve their communities. The enforcement actions that result – from CRA supervision at either the federal or state level – are important signals for assessing the likely impacts of a merger on convenience and needs. Accordingly, evidence that has been uncovered from state and federal CRA supervision must be considered during merger review.

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

NCRC recommends revisiting the HHI thresholds overall and in rural areas. When concentration levels exceed HHI thresholds, CBPs and CBAs should have a specific section addressing goal setting in the areas experiencing reduced competition in order to compensate these communities for anti-competitiveness impacts. In addition, the agencies must require rigorous quantitative goal setting in CBPs and CBAs that are then subject to agency review and sanctions for non-compliance.

NCRC suggests the following additional quantitative measures:

Revision of HHI screen: When the Department of Justice asked for comments on their merger guidelines in 2020, they asked whether the HHI screens should be revised from 200/1,800 to

⁵⁰ NCRC letter to the OCC, September 2021 available from NCRC upon request.

⁵¹ FDIC conditional approval of July 2021, available from NCRC upon request.

⁵² Federal Reserve Board approval order, March 2022, see <https://www.federalreserve.gov/newsevents/pressreleases/orders20220322a.htm>

⁵³ Khan, L. (2018). The New Brandeis Movement: America’s Antimonopoly Debate. *Journal of European Competition Law & Practice*, 9(3), 131–132. <https://doi.org/10.1093/jeclap/lpy020>

other thresholds such as 100/1,800.⁵⁴ NCRC believes that the screen should be revised in this manner since mergers often have negative impacts on communities. When the merger exceeds the HHI threshold in a geographical area, the agencies should require a CBP or CBA to specifically address needs and create goals that address this impact on competition for that geographical area. If the agencies opt to retain the 200/1,800 screen, the 100/1,800 screen should nevertheless receive elevated attention. It could perhaps become a screen applied to underserved counties or census tracts as described in previous NCRC white papers.⁵⁵ In addition, communities of color have less competition as documented in a recent Brookings report. The 100/1,800 screen could be applied to determine appropriate remediation measures.⁵⁶

Quantitative performance measures in CBPs, CBAs and conditional merger approvals – CBAs and CBPs should not just present dollar amounts of future loans and investments. In addition, they should have quantitative performance measures similar to those in CRA exams so the public can judge how or if they will improve bank performance. In the case of retail lending, for example, the bank’s promised percentage of home loans to low- and moderate-income (LMI) borrowers could be compared to a demographic benchmark (percent of households in a geographical area that are LMI) and an industry benchmark (percent of loans issued by all lenders, as a group, to LMI borrowers). Likewise, community development (CD) financing could be expressed as a ratio of CD financing per assets and deposits and compared to industry peers.

When evaluating applications, lending to Black, Latinx, Asian, and Native American borrowers be added as a factor in the discussion of quantitative performance measures in CBPs, CBAs and conditional merger approvals. Similarly, applicants should commit to exceeding local area industry benchmarks for hiring and supplier diversity.

Since banking law requires mergers to confer public benefits, the merging banks’ performance on the metrics should exceed industry peers on a significant number of the metrics for retail lending, community development financing, services and branching. If an applicant applies with a CBP that does not make a commitment to exceed industry peer performance, or the CBP is vague regarding comparative performance, the application should not be approved.

Likewise, conditional merger approvals should contain goals using performance measures. The FDIC issued conditional approvals in merges involving Renasant Bank in 2013 and more recently involving Tri Counties Bank in December of 2021. While the approval orders required

⁵⁴ US Department of Justice. (2020). *Antitrust Division Banking Guidelines Review: Public Comments Topics & Issues Guide* [Request for Comment on 1995 Banking Guidelines]. US Department of Justice Antitrust Division. <https://www.justice.gov/atr/antitrust-division-banking-guidelines-review-public-comments-topics-issues-guide>

⁵⁵ Mitchell, B., & Silver, J. (2020, January 14). *Adding Underserved Census Tracts as Criterion on CRA exams* » NCRC. <https://ncrc.org/adding-underserved-census-tracts-as-criterion-on-cra-exams/>

⁵⁶ Kristen E. Broady, Mac McComas, & Amine Ouazad. (2021, November 2). An analysis of financial institutions in Black-majority communities: Black borrowers and depositors face considerable challenges in accessing banking services. *Brookings*. <https://www.brookings.edu/research/an-analysis-of-financial-institutions-in-black-majority-communities-black-borrowers-and-depositors-face-considerable-challenges-in-accessing-banking-services/>

goal setting in relationship to demographic and lending peer benchmarks, the specific goals eventually adopted by the banks were not made public. These goals must be public so that members of the public can judge how the bank performed in comparison to the goals and thus be able to comment on goal attainment for upcoming CRA exams and any future merger applications.

As stated above, CRA exams must automatically evaluate compliance with CBPs, CBAs and conditional merger approvals. Meeting or exceeding goals in the commitments should help boost CRA ratings while falling far short of goals should negatively influence ratings. In addition, the agencies should conduct independent reviews at the end of the terms of CBPs and CBAs. Failure to comply with the goals would result in an inability to merge in the future until the failure is rectified by compliance with a new CBP or CBA.

Updated CRA and fair lending analysis: As stated above, the agencies should not rely too much on previous CRA exams and fair lending reviews. In response to “CRA protest letters” (as the FDIC refers to comments critical of merging banks’ CRA and fair lending performance), the FDIC and other agencies should conduct updated analysis of the lending, investing and service performance in geographical areas of concern. The FDIC used the most recent Home Mortgage Disclosure Act (HMDA) data in the Tri Counties case mentioned above to investigate community groups concern. This practice must be codified in any regulatory reform of merger application procedures.

HHI for smaller banks and rural areas – Approximately 88% of rural markets are currently considered highly concentrated (HHI is above 1,800).⁵⁷ Consequently, it is more likely that bank mergers proposed in rural areas will exceed the HHI threshold of 200/1,800. At this point, we do not have any recommendation about how to possibly alter the threshold for rural areas. The FDIC should conduct more research about how often mergers in the last few years exceeded this threshold in rural areas. Importantly, it might not be desirable to alter or relax the threshold in many cases because it is a fact that there are fewer banks and less competition in rural areas.

A consideration for the FDIC is the size of the merging banks, particularly when considering impacts in rural areas or smaller metropolitan areas. Research has shown the lending declines are more likely in the case of large bank mergers than smaller ones.⁵⁸ The FDIC should undertake a systematic literature review and engage their economists in additional research to track price and lending changes after mergers involving banks of differing sizes and the impacts of in- or out-market mergers across different geographical markets including large metropolitan areas, smaller metropolitan areas and rural counties. If, for example, research shows worse outcomes for

⁵⁷ 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>

⁵⁸ Bernadette A. Minton, Alvaro G. Taboada, & Rohan Williamson. (2019, January 15). *Bank mergers and small business lending: Implications for community investment*. Financial Management Association Annual Meeting, New Orleans, Louisiana. <http://www.fmaconferences.org/NewOrleans/Papers/SBM01152019FMA.pdf>

mergers involving larger banks in a subset of geographical areas such as rural counties, the current or any revised HHI threshold that is more stringent should apply for large bank mergers but could be altered for smaller banks when ordering branch divestitures.

In no case, however, should banks merging in areas with high concentration levels be relieved of an obligation to submit a CBP or CBA that includes addressing needs and goals in those geographical areas. Areas with high concentration are most likely to suffer harm from mergers and disproportionately include rural areas, communities of color and other underserved areas.

Flexibility for acquisitions by online financial institutions: Regulators should be highly skeptical of any instance where an online financial institution purchases a bank with the intent to close some or all of its branches. Such a scenario presents an interesting contradiction, as the combination would remove deposits from the numerator and the denominator of an HHI analysis, and as such HHI would fail to gauge the change in competition in the marketplace.

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

The agencies historically have relied too much on their anti-competitive analysis to require partial solutions of branch divestitures in markets with high post-merger concentration levels. They employ a Herfindahl-Hirschman Index (HHI), which consists of squaring the deposit market shares of banks in a geographical area before and after a merger. Higher numbers indicate more concentration and less competition.⁵⁹

However, analysis of competition in merger reviews extends only to deposits and ignores the possibility that concentrations could differ and be potentially greater in other product sectors. For example, in a market with six banks but only two small business lenders, a merger could lead to a market with a single small business lender. In a case where an acquiring bank chose to shutter a small business lending division at the acquired institution a similar blow to competition would occur. Small business lending provides only one example. Similar concerns could exist for many other areas of business within banking. Similarly, a merger could lead to a deterioration in services, an increase in fees, the elimination of a useful small-dollar credit product, or a loss of programs to stimulate financial inclusion. None of these would necessarily be a product of deposit concentration exclusively, and in fact, many of these negative outcomes could occur without additional deposit concentration.

While banking consists of three things (lending, deposit-taking, and payments),⁶⁰ the approach is only sensitive to deposit-holding. HHI does not reveal the possibility that there could be harmful effects in sub-markets, such as small business or mortgage lending. The Department of Justice notes that competition in specialized product markets could be impacted if the merging

⁵⁹ US Department of Justice. (2016). *Horizontal Merger Guidelines*. <https://www.justice.gov/atr/horizontal-merger-guidelines-0>

⁶⁰ Brendan Pedersen. (2021, October 13). Is modernizing National Bank Act the answer to fintech charter woes? *American Banker*. <https://www.americanbanker.com/news/is-modernizing-national-bank-act-the-answer-to-fintech-charter-woes>

institutions are among the only firms offering that them, but “the screens likely would not identify a concentrated market...in such cases, applicants may wish to submit additional information.”⁶¹

When the post-merger HHI in a metropolitan area or other geographical area exceeds 1,800 and has increased 200 points due to a merger, the agencies have ordered the merging banks to sell branches as a means to mitigate anti-competitive harms. However, branch divestitures do not guarantee benefits like increases in loans as a CBP or CBA would. In addition, the agencies should require either CBPs or CBAs to specifically create goals in geographical areas where their HHI analysis exceeds anti-competitiveness thresholds.

We offer the following in response to specific subparts of question 6 asked by the FDIC.

a. The merging parties do not significantly compete with one another;

We do not think any changes need to be made to existing HHI analysis to take this factor into account. Using publicly available data, an HHI analysis will compute market shares of institutions in a geographical area. If one of the banks involved in the merger is not a competitor and has no market share in a given area, this will be taken into account by the HHI analysis (the market share of that bank will be zero, which will be squared and still equal zero in the HHI analysis). However, current HHI analysis uses only deposit data for banks. This needs to change as described below to take competition or concentration in other product lines into account.

Regulators should penalize applicants when their applications include plans to shutter business lines that are not compensated by offering new products at scale. By definition, such an approach would undermine the convenience and needs of the public. A few years ago, a large credit card bank acquired a number of other banks in quick succession, shuttered several branches and discontinued its mortgage lending operations. It did not offer any new products or services to compensate the public for the reduction in product availability. It seemed to be on a mission to increase its market share or power without caring about the impact on convenience and needs. Such a strategy should not receive regulatory approval.

b. Rapid economic change has resulted in an outdated geographic market definition and an alternate market is more appropriate;

There are two parts to this answer. The first involves geographical market definitions. Conventional HHI analysis focuses on the metropolitan area as the unit of analysis. However, as discussed above rural counties have much higher concentration levels as do communities of color. The agencies must therefore include rural counties and areas with high shares of people of

⁶¹ Department of Justice. (2007). *Bank Merger Competitive Review—Introduction and Overview (1995)*. Department of Justice. <https://www.justice.gov/sites/default/files/atr/legacy/2007/08/14/6472.pdf>

color in their HHI analysis. In addition, Tarullo suggests that a regional analysis of potential anti-competitiveness should be conducted.⁶²

The second part of this answer is that the focus on deposit data is decades old and better describes banking and lending markets in the 1970s and 1980s instead of today. HHI analysis must analyze lending as well as deposits. Even within deposit analysis, the agencies must collect better deposit data on a county level that more accurately reflects the market shares of traditional banks and on-line lenders. To the extent possible, the analysis should also consider the impact on competition of partnerships among banks and non-banks for offering deposit accounts and other banking services.

Independent mortgage companies are among the largest home lenders in many MSAs. An HHI analysis must therefore consider home lending in addition to deposits and use HMDA data for banks and non-banks in order to adequately capture the amount of concentration in markets. Finally, CRA small business data and eventually the CFPB's Section 1071 small business data should be used to assess small business lending and concentration levels in various geographical areas. If consumer lending is captured in a publicly available database in the future, HHI analysis should also consider concentration in consumer lending markets.

If the agencies use deposit and various lending data to conduct HHI analysis, they will have to make decisions as to how much each of these analyses will weigh in their final decisions. It would seem that remediation activities such as CBPs, CBAs, conditional merger approvals and branch divestitures should be targeted to geographical areas and/or product lines exhibiting high concentration levels. For example, if small business lending markets became highly concentrated in particular metropolitan areas or rural counties, remediation measures would target small business lending in those areas.

(c) Market shares are not an adequate indicator of the extent of competition in the market;

If the publicly available data does not capture all types of institutions, particularly the larger institutions as measured by product volume, market share and HHI analysis will be incomplete. Thus, the agencies must improve the publicly available of data on deposit-taking and lending activity. Also, if publicly available data does not capture major products including various lending or deposit-taking activity, the HHI analysis will be incomplete. Data on additional products of importance such as consumer lending, especially for underserved communities, would need to be collected to make HHI analysis more robust.

When non-banks have significant shares of any product in a geographic area, it should trigger a concern among reviewers that the conveniences and needs of consumers are not being met. For

⁶² Tarullo, D. K. (2022, March 16). Regulators should rethink the way they assess bank mergers. *Brookings*. <https://www.brookings.edu/opinions/regulators-should-rethink-the-way-they-assess-bank-mergers/>

example, if smaller businesses use non-bank lenders at outsized rates, it should suggest that incumbent banks are already underperforming. Often, non-banks price business loans at much higher rates than banks,⁶³ which would be another indication of a market lacking robust competition particularly if smaller businesses are increasingly relying on non-banks. A proper remedy would not be to require the acquiring institution to maintain existing service levels, but to improve on activities as a part of a public benefits test.

(d) A thrift institution is actively engaged in providing services to commercial customers, particularly loans for business startup or working capital purposes and cash management services;

Currently, HHI analysis weights thrift deposits less than bank deposits. This is outdated and the difference in treatment should be eliminated. A Federal Reserve Question and Answer document states that thrift deposits were generally weighed less because thrifts were not involved in as many retail lending markets as banks.⁶⁴ However, if HHI analysis is revised to separately assess competition in deposit and lending markets this procedure becomes outdated.

HHI analysis should consider all lenders that make commercial loans because only then can it adequately consider the precarious position of small businesses in the marketplace. Reviews should recognize that smaller businesses are, by the very nature of their position in the market, already constrained by competition from larger and mega-sized firms. Increasingly, businesses are split among the “haves” and “have-nots.” With the advent of supply chain management, just-in-time manufacturing, and surveillance capitalism, small businesses are inherently disadvantaged. Justice Brandeis held the opinion that protecting smaller firms from larger competitors was a necessary component of merger review. Brandeis brought a view oriented to the public interest, emphasized a more nuanced process, and was wary of the potential for size to “become noxious by reason of the means through which it is attained or the uses to which it is put.”⁶⁵ Given that banks act as intermediaries with the authority to allocate credit, they can have a significant impact – positive or negative – on the ability of smaller-sized firms to compete in the marketplace. When considering the benefit to the public of a proposed merger, reviewers should focus on how banks will ensure that smaller-sized businesses have access to the banking services they need to remain competitive.

⁶³ Lipman, B. J., & Wiersch, A. M. (2019). Uncertain Terms: What Small Business Borrowers Find When Browsing Online Lender Websites (p. 36). Federal Reserve Bank of Cleveland. <https://www.federalreserve.gov/publications/files/what-small-business-borrowers-find-when-browsing-online-lender-websites.pdf>

⁶⁴ Board of Governors of the Federal Reserve. (n.d.). How do the Federal Reserve and the U.S. Department of Justice, Antitrust Division, analyze the competitive effects of mergers and acquisitions under the Bank Holding Company Act, the Bank Merger Act and the Home Owners Loan Act? [FAQ: Banking Information and Regulation]. Retrieved March 9, 2022, from <https://www.federalreserve.gov/bankinforeg/competitive-effects-mergers-acquisitions-faqs.htm#faq3>

⁶⁵ Eric Dash. (2009, June 20). If It’s Too Big to Fail, Is It Too Big to Exist? *New York Times*. <https://www.nytimes.com/2009/06/21/weekinreview/21dash.html>

(e) A credit union has such membership restrictions, or lack of restrictions, and offers such services to commercial customers that it should be considered to be in the market;

Our answer is the same as in (d) above. The most accurate description of a market is to use data from all parties in an un-weighted manner and to look at lending markets in addition to deposit markets.

Credit unions hold deposits but do not generally offer the same breadth of services as offered by banks. For example, credit unions excel at provide home-equity lines-of-credit but are often less focused on commercial lending. For regulators to include credit unions and to simultaneously limit their assessments of concentration to deposit holdings would create “false positives” about the degree of concentration in a community.

(f) There is actual competition by out-of-market institutions for commercial customers, particularly competition for loans for business startup or working capital purposes.

It would seem that this would need to be considered on a case-by-case basis and that regulations and guidelines should allow for this individualized basis. There might be instances in which publicly-available data will not capture the state of competition in all markets so anecdotal knowledge or journalistic reporting may have to supplement the data in some cases when concerns need to be further investigated. It is hoped, however, that the Section 1071 data will contain robust data fields capturing loan purposes such as those listed in this question.

In some cases, if non-banks have significant market shares, it suggests that incumbent depository institutions have not met the convenience and needs of the community. Accordingly, regulators should expect the applicants to indicate how they will improve their performance as a part of filing their community benefits plan.

(g) There is actual competition by non-bank institutions for commercial customers, particularly competition for loans for business startup or working capital purposes.

Same answer as in (f). Again, we hope that the final rule for the CFPB Section 1071 data will capture non-bank lenders and these important loan purposes.

(h) With respect to the preceding factors, how and to what extent should the activity of current branches or pending branch applications be considered?

Publicly available data can provide insights into how activity of current branches impact HHI analysis. Some data such as the CRA small business data can be matched to specific branches to

better estimate HHI figures on a county or metropolitan level.⁶⁶ In other cases, assumptions have to be made as with HMDA data that does not allow a researcher to connect home loans reported under HMDA with specific branches. The agencies should consider whether the publicly available databases should be made more uniform connecting lending activity to branches in order to make HHI analysis more precise. The same recommendation concerns deposit data since the publicly available data on deposits is not precise regarding which branches originate which deposits.

When merging banks propose branch closures, the activity of the branches involved should be highly scrutinized in order to determine the importance of those branches to local customers accessing either deposit accounts or loans. If the agencies determine that the branches in question are important based on data analysis or public testimony, especially for underserved areas, they should be prepared to either reject the application or institute meaningful remediation measures.

In addition, when banks propose to close branches in underserved areas, whether these are identified via NCRC's methodology as discussed above or are rural areas or communities of color, the agencies should presume that such closures will be harmful. Remediation measures should include either halting the closures or arranging for alternatives such as sales to other banks or donations to Community Development Financial Institutions (CDFIs), minority depository institutions (MDIs) or women owned financial institutions or low-income credit unions.

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

While it appears to be the case that some mergers are scuttled prior to being announced, the historical record of the last two decades suggests that a publicly-announced merger will be approved. The Federal Reserve approved 3,316 consecutive merger applications between 2006 and 2017.⁶⁷ It is not reassuring to know that prudential regulators sometimes scuttle an application before it can be announced to the public. If a merger is effectively approved once it has been announced, then the process of merger review and the implicit weight given to public input therein are illusory.

As discussed above, we believe that the current merger application process creates an implicit presumption of approval. HHI analysis has dominated the merger application process. It seems that unless HHI levels are concentrated across several areas, the merger will proceed with perhaps some branch divestitures. Branch divestitures are also insufficient by themselves to address harms associated with mergers as discussed above.

⁶⁶ 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/>

⁶⁷ Kress, J. C. (2020). Modernizing Bank Merger Review. *Yale Journal on Regulation*, 37, 64.

In such a scenario, public input is “ex post facto,” as its ability to comment on a merger occurs only after an announcement of it to the public and such announcement implies that approval is guaranteed. That shortcoming is only made worse by the fact that important resources for assessing public input – such as those held inside the CFPB – may have never been tapped by the reviewers.

The presumption of mergers benefiting communities should be reversed. Mergers, especially those involving larger banks, should be presumed to have harmful impacts in terms of higher prices and reduced product choice and volume. Unless supported by the cost-benefit analysis and adequately remediated by CBPs or CBAs, the mergers should not proceed. CBPs or CBAs should address goals for the entire bank footprint or all geographical areas served by the banks. CBPs and CBAs should also address harms in geographical areas in which the HHI thresholds are exceeded. Further, the cost-benefit analysis should inform whether the agencies should impose any conditions on merger approval that CBPs or CBAs did not or cannot address due to significant institutional changes or even structural changes to markets in specific communities, metropolitan areas, counties or regions.

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

The burden of proof has not been appropriately structured, given the de facto presumption in favor of mergers and the failure to require or scrutinize community commitments. We recommend the modifications discussed in detail throughout this letter, and banks must submit CBPs or CBAs that not only include dollar amounts but quantitative measures including percentages of loans to various borrower groups so that the public can judge the adequacy of these proposed commitments. Similar procedures should involve CBPs or CBAs addressing areas with high concentration levels and conditional merger approvals. Finally, cost-benefit analyses discussed in Question 4 should constitute part of the burden of proof that agencies should place upon banks seeking to merge.

We call on prudential regulators to develop systems for verifying that banks have met the terms of their community benefits plans during the five years following merger approval. As a consequence of meaningful failure to implement their promises, regulators should consider options to suspend future merger applications from those banks.

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

During the financial crisis of 2008, the agencies approved and ordered large-scale emergency acquisitions that involved large-scale subprime lenders like Countrywide with high volumes of

delinquent and highly toxic loans. The agencies believed that these approvals were necessary in order to prevent another Great Depression and to preserve the financial system. While it is beyond this comment letter to evaluate whether this assessment was accurate, the major point is that any type of emergency or exception authority should be used for rare events that mirror past economic tragedies. Perhaps quantitative measures identifying catastrophic conditions could be developed that guide when this extraordinary authority is used so that the financial system does not become even more vulnerable in the future due to these emergency acquisitions when they are not necessary.

Acting Comptroller Hsu in a speech in April stated:

But from a broader financial stability perspective, a Globally Systemic Important Bank (GSIB) would be forced through a shotgun marriage to be made significantly more systemic, with minimal due diligence and limited identification of integration challenges, which for firms of this size are significant. In addition, with the resulting increase in the concentration of banking—of making one of the biggest firms even bigger and more systemic—trust in the resolution process and in the government’s ability to proactively manage such situations would likely erode, just as it did over the course of 2007 when a series of such shotgun marriages were carried out.⁶⁸

While the Comptroller’s speech did not offer a comprehensive solution to this dilemma, it did suggest that when large regional banks could become GSIBs in the future, they need to present a comprehensive strategy for resolution in the case of failure. At the very least, Acting Comptroller Hsu’s comments underscore why regulators should apply higher standards to larger mergers and should never approve a merger without a full resolution plan. These strategies, submitted as part of applications, would include making investors, not taxpayers assume resolution losses, and would include the ability to sell off separate operations of the bank. This recommendation should be seriously considered by the agencies on an interagency basis.

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

Above, this comment letter addresses situations involving smaller banks and rural areas with high concentration levels. Any differential treatment must be based on sound econometric and other quantitative research involving mergers with various asset sizes and combinations of in-market and out-of-market institutions. Differential treatment would only apply in branch

⁶⁸ Michael J. Hsu. (2022, May 9). *Acting Comptroller of the Currency Michael J. Hsu Remarks at Brookings “Bank Mergers and Industry Resiliency.”* <https://occ.gov/news-issuances/speeches/2022/pub-speech-2022-49.pdf>

divestiture orders and not for CBPs and CBAs that can be tailored for banks of various sizes and capacities as discussed above.

Conclusion and Summary of Recommendations

The federal agencies need to substantially revise the application of the four prongs of merger reviews. They must add weight to the significance of public benefits, apply more qualitative nuance to the analysis of the effects of a merger on competition, expand consideration of managerial strength to include compliance with all consumer protection rules, and ensure that mergers will not expose markets to systemic risk. There is a firm foundation (and directive) for these improvements within existing merger law – so policy change can occur within the regulatory process.

The convenience and needs prong has been the most neglected and must be updated with a cost-benefit analysis that includes an examination of whether loans, investments and services will increase after merger approval. The application of anti-competitiveness prong has likewise been inadequate and has resulted in merger approvals that reduce competition and product availability. Finally, the managerial and financial stability prongs are also in need of revision.

The major recommendations of our comment include,

- *Cost-benefit analysis of impact on conveniences and needs:* For each application, prudential regulators should create cost-benefit analyses that assess the impacts to the public, using quantitative measures where possible, and considering non-financial impacts on items such as entrepreneurship or labor rights for applications that would create large combinations.
- *Community Benefit Plans (CBPs) should be required for all mergers.* CBPs require goal setting in terms of increases in loans, investments and services like a CBA but do not involve negotiations with community-based organizations, resulting in a signed document. The CBPs would use standardized metrics for demonstrating how the merging banks' performance would exceed industry peers in retail lending, community development financing and services.
- *The agencies should encourage CBAs, particularly for the largest bank mergers.* The agencies should encourage CBAs as effective mechanisms for ensuring public benefits and increases in loans, investments and services after mergers. The CBAs would require banks to improve their reinvestment activity in their entire geographical footprint.
- *CBPs and CBAs must include specific goals for geographical areas with high post-concentration levels as revealed by HHI analysis.* Areas with high HHI levels are very likely to experience negative impacts of mergers, which must be remedied by specific goals in CBPs or CBAs.
- *Public hearings should be built into all merger reviews.* During the pandemic, the agencies held virtual hearings. This model can be expanded going forward. At a certain

point during the process, perhaps a few days after the public comment period has expired, the agencies should host a virtual hearing to allow members of the public to comment verbally. This maximizes public input into whether and how community needs can be met after a merger. In addition, the agencies should host in-person meetings in communities facing significant increases in bank concentration post-merger, considerable possibilities of significant branch closures and/or in communities in which the banks performed poorly on their most recent CRA exams and fair lending reviews.

- *Agency websites must be vastly improved to inform the public of pending mergers and to make it easier for the public to comment and enable the public to search for agency decisions on the mergers. Pre-application discussions and document sharing occurring among the agencies and banks must be made publicly available as well.*
- *Consideration of the most recent CRA exams and ratings are important factors but they must not be considered determinative for merger reviews. CRA performance could have changed since exams which can be two years or older. Also, mergers have profound impacts on banks' internal structures including their CRA infrastructure, which can impact their future abilities to meet convenience and needs. Thus, a concrete demonstration of public benefits must receive priority attention in decisions on merger applications.*
- *Agencies should hold acquiring institutions accountable to demonstrate that they have met the terms of CBPs and CBAs in the years after a merger is approved. CRA exams should scrutinize compliance with CBPs and CBAs. In addition, the agencies should review compliance at the end of the terms of CBPs and CBAs. Non-compliance should result in no approvals of mergers or acquisitions until a bank has submitted a new CBP or CBA and has demonstrated compliance with it.*
- *The HHI threshold of 200/1800 should be replaced by a threshold of 100/1800. At the very least, mergers that increase the HHI by 100 points in concentrated markets should receive more scrutiny and be subject to CBPs or CBAs that describe goals in the affected geographical markets.*
- *HHI analysis cannot only be conducted for deposit markets but also for home loan markets and small business loan markets in order to most accurately assess the impacts of concentration in various geographical areas and to account for non-banks, including online institutions. Consumer lending markets should also be considered when data becomes available.*
- *HHI analysis is complicated in rural markets, most of which are already highly concentrated. If the agencies decide that mergers involving smaller banks in rural areas have a well-defined exception from HHI thresholds, they should nevertheless require a concrete commitment to a public benefit for rural markets that exceed thresholds.*
- *The Consumer Financial Protection Bureau (CFPB) must formally be involved in merger application decisions. Currently, the federal bank agencies consult informally with the*

CFPB during merger proceedings. The CFPB has fair lending enforcement and compliance responsibilities for banks with assets above \$10 billion.⁶⁹ In addition the agency maintains a consumer complaint database and will soon have the benefit of a database on small business lending, providing it with insights into banks' compliance with consumer protection laws. Thus, the CFPB must formally be involved in merger reviews and empowered with a veto of a merger approval in all cases.

- *An interagency approach will be the most effective means for developing a comprehensive assessment of the four tests for merger review.* The CFPB can provide important information on consumer protections, but other agencies can add important inputs on managerial resources and potential impacts to systemic risk.
- *As a condition of approval involving institutions where systemic risk management problems have occurred,* regulators should confirm that both institutions have effective audit committees, whistle-blower protection programs, procedures for external audits, and certification processes for third-party relationships.

NCRC appreciates the opportunity to comment on this important matter. We hope that the FDIC, the OCC, and the Federal Reserve Board carefully consider the comments generated in response to this RFI and that they coordinate revisions to the merger application regulations along the lines suggested in this letter.

If you have any questions, please contact Josh Silver on jsilver@ncrc.org, Adam Rust on arust@ncrc.org or myself on jvantol@ncrc.org.

Sincerely,



Jesse Van Tol
Chief Executive Officer

⁶⁹ Consumer Financial Protection Bureau. (2017). *CFPB Supervision and Examination Process Overview*. https://files.consumerfinance.gov/f/documents/032017_cfpb_examination-process-overview_supervision-and-examination-manual.pdf