June 18, 2024

RE: Statement of Policy (SOP) on Bank Merger Transactions, RIN 3064–ZA31

To Whom it May Concern:

The National Community Reinvestment Coalition (NCRC) appreciates the opportunity to comment on proposed changes to the FDIC's statement of policy on bank merger transactions. Bank mergers profoundly impact banks' capacities to serve the convenience and needs of communities. If the federal bank agencies do not adopt robust reviews of bank merger applications, mergers are likely to harm communities through reductions in loans, branches, and loss of jobs. On the other hand, banks will be able to improve their capacity to serve communities if the agencies ensure that mergers preserve banks' institutional structures and commitments for lending and investing in all communities and do not create markets without strenuous competition.

NCRC is a network of more than 700 community-based organizations dedicated to creating a nation that not only promises but delivers opportunities for all Americans to build wealth and attain a high quality of life. We work with community leaders and policymakers to advance solutions and build the will to solve America's persistent racial and socio-economic wealth, income, and opportunity divides, and to make a Just Economy a national priority and a local reality. NCRC submits this letter on behalf of our members and 64 community-based organizations that signed onto the letter.

The public needs to have confidence that the bank agencies are reviewing bank merger applications in a rigorous manner. While NCRC appreciates the FDIC's transparency regarding merger approvals, we note that there was a high incidence of approvals of almost 93 percent of applications submitted between 2004 and 2023. About 5.4 percent of the applications were withdrawn by the applicant. According to the FDIC, banks often withdraw applications when they expect them to be denied. Although no applications were officially denied during this time period, the withdrawal rate of 5.4 percent serves as somewhat of a proxy for denials.[1]

The effective denial rate nonetheless appears to be low, particularly from the point of view of advocacy organizations who are keenly aware that CRA performance of banks can vary widely and that it is unlikely that more than 90 percent of bank merger applications to the FDIC exhibited good to exemplary CRA performance during the two decades of FDIC application data.

What is missing from the FDIC data is how many of the approved applications were conditional approvals subject to mandated improvements to CRA or other aspects of bank service to the community. If conditional approvals were more than an incidental amount, then the FDIC merger

[1] Federal Deposit Insurance Corporation (FDIC), Request for Comment on Proposed Statement of Policy on Bank Merger Transactions Federal Register, Vol. 89, No. 77, Friday, April 19, 2024, p. 29227, https://www.federalregister.gov/documents/2024/04/19/2024-08020/request-for-comment-on-proposed-statement-of-policy-on-bank-merger-transactions

review process could be strenuous. We suspect, however, based on the above statistics that the reviews need to be more rigorous. The proposed statement of policy, if implemented assiduously, would be a good step to improving review rigor and ultimately increasing access to credit and banking services to underserved communities.

NCRC urges the FDIC, the Office of the Comptroller of the Currency (OCC), and the Federal Reserve Board to recognize community benefit agreements and plans involving discussions with community-based organizations as one of the most effective means for banks to ascertain and respond to community needs. Ironically, except for the OCC's streamlined application form,[2] the agencies do not reference community benefit agreements (CBAs) or benefit plans in either their regulations or application preparation materials. They sometimes discuss CBAs in approval orders. This rulemaking and the companion effort by the OCC is a keen opportunity to elevate the consideration of CBAs and emphasize the importance of sustained and deep community input into banks' plans for serving convenience and needs.

The commendable aspects of the proposed statement include:

- An implicit acknowledgement of the value of community benefit agreements (CBAs) negotiated with community organizations. The proposed statement indicates that "commitments" made by applicants could be included in approval orders, suggesting that the FDIC will enforce the terms of any bank commitments.
- A clear statement of public benefits arising from mergers in which the FDIC affirms that mergers should result in greater access to bank products and services, and reduced prices and fees.
- A presumption of holding public hearings on mergers if the asset size of the merged banks would be at least $50 billion or if the public submitted several comment letters indicating concerns about the merger from a CRA and convenience and needs perspective.
- A potentially high bar for public benefits exceeding harms to competition due to mergers. NCRC suggests, however, that the final statement of policy include more specifics about how benefits need to exceed harms to competition.
- A more holistic evaluation of competitive impacts using data beyond deposits to also include lending data and a greater variety of market participants.

Areas in need of improvement include:

- Increased transparency regarding any pre-filing communications. The FDIC should commit to make any pre-filing emails, documents, or presentations shared between the FDIC and banks publicly available as part of regular application materials.

[2] Streamlined Business Combination Application, https://www.occ.treas.gov/static/licensing/form-business-combo-app-streamlined-v2.pdf,

- Extensions of public comment periods if the FDIC grants requests under the Freedom of Information Act during mergers.
- Descriptions of additional criteria for holding public hearings beyond the asset size of the merging banks to include situations in which significant overlap in branch networks occurs.

Our comment now describes the various statutory factors reviewed in the proposed statement of policy including convenience and needs, competition, financial and managerial resources, and impacts on the financial stability of the banking system.

Convenience and Needs

Make Recognition of Community Benefit Agreements Explicit

While the FDIC does not require banks to enter into community benefit agreements (CBAs) negotiated with community organizations, the FDIC recognizes that CBAs and other commitments are valuable means for banks to demonstrate the public benefits of their proposed mergers. The FDIC states,

> As appropriate, claims and commitments made to the FDIC to support the FDIC's evaluation of the expected benefits of the merger may be included in the Order, and the FDIC's ongoing supervisory efforts will evaluate the Insured Depository Institution's (IDI's) adherence with any such claims and commitments.[3]

The Director of the Consumer Financial Protection Bureau (CFPB) and a member of FDIC's board of directors elaborated on this statement in a recent speech in which he stated:

> If the banks make certain representations or commitments in the application to demonstrate how the community will be better off, including by submitting a Community Benefits Agreement, some of these requirements may be formal conditions of approval.[4]

This proposed statement would represent an important advance in merger review and post-merger enforcement. The bank agencies' current regulations or policy statements do not contain statements suggesting that commitments like CBAs could possibly be included in agency approval orders and thus subject to post merger enforcement. In response to Question 24, we urge the FDIC to retain this aspect of the proposal and would hope that post-merger enforcement would include review of commitments on CRA exams and adjustments to CRA ratings depending on the degree of progress (exceeding or falling short) in fulfilling commitments.

The policy statement should also specify that any community benefit agreements (CBAs) negotiated with community organizations that include measurable goals for meeting needs will

[3] FDIC proposed statement of policy, p. 29242.
[4] Prepared Remarks of CFPB Director Rohit Chopra at the National Community Reinvestment Coalition, April 4, 2024, https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-at-the-national-community-reinvestment-coalition/

be considered in assessing the extent to which convenience and needs will be met by the merger. At the very least, evidence of banks working in partnership with nonprofit organizations and local government agencies in addressing needs should be a consideration in the convenience and needs analysis. In addition, bank commitments to start or continue special purpose credit programs focused on underserved populations should be considered during reviews of merger applications. Likewise, bank commitments to serve people with limited English proficiency and people with disabilities should be a criterion in the convenience and needs factor.

The agencies should recognize in their regulations and application materials that CBAs and similar engagements with community organizations are key to identifying and responding to a variety of needs across local geographical areas. A bank's assessment of convenience and needs must include community groups in a meaningful way, and a CBA is one of the best ways to do that. Commonly, banks will conduct community meetings to gather data on convenience and needs, without reporting to the people involved the ultimate purpose of the meeting, or the subsequent use of the information gathered, much less any outcome.

In contrast, a CBA that is reached with a process that involves several community organizations and has broad-based support should be viewed as a more legitimate statement of public benefit than a unilateral commitment by a bank, or a commitment made with just one or a few organizations involved. A CBA that involves several groups serving diverse communities across several states is also likely to be able to respond to a wide variety of local needs. Furthermore, whether through a CBA or some other mechanism, commitments that contain transparency and accountability mechanisms such as third-party review of and validation of performance data should be viewed more positively than those that do not.

The Forward-Looking Perspective of Ensuring Clear Public Benefits is the Right Way to Consider Mergers

CBAs would be key to ensuring public benefits are realized by the merger and that lending and banking services, particularly to traditionally underserved communities, would increase after mergers. NCRC appreciates that the FDIC's statement has the same objective as CBAs in clearly stipulating that public benefits must entail concrete improvements in bank product availability and affordability. The proposed policy statement mandates:

> The FDIC expects that a merger between IDIs will enable the resulting IDI to better meet the convenience and the needs of the community to be served than would occur absent the merger. Applicants are expected to demonstrate how the transaction will benefit the public through higher lending limits, greater access to existing products and services, introduction of new or expanded products or services, reduced prices and fees, increased convenience in utilizing the credit and banking services and facilities of the resulting IDI, or other means.[5]

[5] FDIC proposed statement of policy, p. 29242.

Since CRA performance reviews past performance, the FDIC is absolutely correct that the legal requirement of public benefits arising from mergers also requires a forward-looking analysis that considers whether institutional changes after a merger will enable the resulting bank to improve its ability to provide products and services or inhibit the provision of affordable products.[6] The proposed policy statement appropriately requires banks to provide information for the next three years regarding various aspects of branching and banking services including whether branches will be opened or closed and anticipated job losses arising from closures.[7] In response to Question 26 regarding information on retail services, information that would enhance the public benefits analysis is the number of loans, deposit accounts, and jobs associated with any branches to be closed as well as projections regrading loans, deposit accounts, and jobs associated with any branches that would be opened.

In response to Question 21, a three-year time period is feasible in that it generally coincides with other aspects of bank policy and examination including the strategic plan option in lieu of regular CRA exams. Bank strategic plans are often two or three years in duration, suggesting a three-year planning horizon is feasible. NCRC sampled ten of the most recent FDIC strategic plan evaluations; four of these had goals for three years and the other six had goals for two years. Goals included those for community development financing and services, and six plans had goals for retail lending.[8] In addition, CBAs negotiated by NCRC and our member organizations often had goals for four or five years. Some of these like the one for U.S. Bank included goals for increasing the number of branches in LMI tracts and in communities of color.[9]

The FDIC adds in the convenience and needs section of its policy statement that applications which project "material" reductions in services will generally not be favorably received.[10] Indeed, these applications should be denied since they would not meet the public benefits standard.

The FDIC is correct in its decision not to adopt bright lines regarding CRA performance. Industry commenters often suggest that Outstanding ratings should be regarded as a "safe harbors" and as such, should ensure automatic approval of mergers. However, as the FDIC recognizes,[11] CRA performance considers performance in previous years and does not account for institutional changes as a result of mergers, which may in some situations cause a deterioration in CRA performance (particularly when a worse performing CRA bank acquires a better performer).

---

[6] FDIC proposed statement of policy, p. 29230.
[7] FDIC proposed statement of policy, p. 29231 and 29242.
[8] The FDIC reviewed strategic plans included those for First Bank of the Lake, Mission Valley Bank, Sallie Mae Bank, Georgia Banking Company, First Electric Bank, Celtic Bank, CBW Bank, FinWise Bank, Barclays Bank Delaware, and WEX Bank.
[9] U.S. Bancorp, NCRC, CRC Announce $100 Billion Community Benefits Plan, May 9, 2022, https://ncrc.org/u-s-bancorp-ncrc-crc-announce-100-billion-community-benefits-plan/
[10] FDIC proposed statement of policy, p. 29242.
[11] FDIC proposed statement of policy, p. 29230.

The FDIC indicates that less than Satisfactory performance or a deterioration in CRA performance “may present significant concerns in resolving this factor (convenience and needs).”[12] This statement should be stronger. A bank should not be allowed to be involved in a merger if it has failed its CRA exam but must be required to pass before it can be involved in a merger application as either the acquirer or the bank to be acquired. The Gramm-Leach-Bliley Act of 1999 does not allow a bank holding company to acquire an insurance or securities firm if it has failed its CRA exam.[13] The intent of this prohibition should be further carried through in a policy statement indicating that failing CRA exams will have consequences.

Clarity Should be Added about Activities Considered and a Priority Placed on Underserved Communities

NCRC suggests that the FDIC, like the OCC, should add to its statement about convenience and needs a list of bank activities to be analyzed and an emphasis on low- and moderate-income (LMI) and other underserved communities. In its draft policy statement, the OCC enumerates a list of activities considered under a convenience and needs analysis including access to home, small business and consumer loans, community development financing, and branching. Affordability of services and products is also considered.[14] In addition, the FDIC should include climate remediation to its list of criteria for evaluating convenience and needs. Community development efforts will become imperiled if climate remediation does not combat climate change, which increases health and environmental risks that disproportionately affect LMI and formerly redlining communities.

While a review of these activities is implied in the FDIC’s statement of policy, it would be better if they were explicitly listed since mergers can have differential impacts on availability or affordability of various activities, products, and services. As asked by Questions 20 and 27 in the proposal, a list of activities would clarify expectations regarding the FDIC’s review of convenience and needs.[15] Like the OCC, the FDIC states that changes in branches will be considered in LMI census tracts, but the OCC also invited comments on whether impacts on branches should be considered in other communities.[16]

NCRC urges both the OCC and the FDIC to add communities of color as communities the agencies consider in their branching analysis. In previous research, NCRC identified the quintile of census tracts with the lowest levels of home and small business loans across the country. On average, 57 percent of the residents of these tracts were people of color. The FDIC and OCC

[12] FDIC proposed statement of policy, p. 29230.
[13] Financial Services Modernization Act: Gramm-Leach-Bliley – Summary of Provisions, https://www.ffiec.gov/exam/InfoBase/documents/02-con-g-l-b_summary_of_provisions-010416.pdf
[14] Office of the Comptroller of the Currency (OCC), Proposed Rulemaking, Business Combinations Under the Bank Merger Act, Federal Register, Vol. 89, No. 30, Tuesday, February 13, 2024, p. 10018
[15] FDIC proposed statement of policy, p. 29231.
[16] OCC Proposed Rulemaking, p. 10014.

should either explicitly list communities of color or underserved communities when assessing the post-merger availability of branches.

NCRC has developed a methodology for considering when communities are underserved in terms of branching that the FDIC and OCC should consider using or the agencies should revisit the underserved definitions regarding branching in the proposed version of the CRA rule that was finalized in the fall of 2023.[17] Finally, LMI and underserved tracts should receive special attention in the analysis of the availability of other bank products and services under the conveniences and needs factor. The agencies should focus merger reviews on traditionally underserved communities since they often face unique challenges in access to bank products and services after mergers.

Related to consideration of communities of color is the fair lending records of the merging banks. The FDIC indicates in its proposed policy statement that it will review the banks' records of complying with consumer protection laws which include the Fair Housing Act and Equal Credit Opportunity Act.[18] While a review of compliance is welcome, NCRC suggests that any bank that has entered into a fair lending settlement or is subject to an enforcement order should not be allowed to merge until the terms of the settlement have been fulfilled or the enforcement order is lifted. Again, banks should experience consequences for failure to adhere to anti-discrimination and consumer protection law.

FDIC Attention to Public Hearings Appreciated but the Bank Agencies Must Make Hearings More Informative to Aid in Convenience and Needs Analysis

The FDIC states that it will generally hold hearings in cases in which the combined assets of merging institutions will be $50 billion or greater.[19] These mergers are most likely to impact the greatest number of geographical markets. However, they are also relatively rare. As the FDIC indicates, since 2004, the agency has approved just one merger resulting in a bank with more than $100 billion in assets and five mergers involving banks with assets between $10 and $100 billion.[20] In response to Question 22, NCRC believes that several other mergers would necessitate hearings since they also significantly impact markets.

When merging banks have large numbers of branches in the same geographic markets, these areas can experience significant branch losses in the wake of a merger or any agency order to divest branches due to anti-trust concerns. Public hearings and meetings in these situations provide more detail about the importance of the branches and allow stakeholders more time to explore feasible alternatives to widespread branch closures including sales or donations of

---

[17] Bruce Mitchell, PhD. and Josh Silver, *Adding Underserved Census Tracts As Criterion On CRA Exams* (Washington, D.C., NCRC, January 14, 2020) https://ncrc.org/adding-underserved-census-tracts-as-criterion-on-cra-exams/ and see the description of the financial needs index in NCRC, Redlining the Reservation, December 2023, https://ncrc.org/redlining-the-reservation-the-brutal-cost-of-financial-services-inaccessibility-in-native-communities/
[18] FDIC proposed statement of policy, p. 29242.
[19] FDIC proposed statement of policy, p. 29242.
[20] FDIC proposed statement of policy, p. 29237.

branches to mission-based lending institutions like Community Development Financial Institutions (CDFIs) or low-income credit unions. In addition, if one or both banks have Needs-to-Improve or Substantial Noncompliance ratings for states and/or multistate metropolitan areas, public hearings and meetings are needed in order to help the banks develop plans for how to improve their CRA performance in these areas.

Importantly, if an agency receives several comment letters and CRA protests on an application, it should hold a public hearing. We appreciate that the FDIC indicates that the submission of several comment letters is a trigger for holding hearings.[21] Several letters indicate that pressing CRA and fair lending matters are in the mix, and it is incumbent on federal agencies to further investigate those. For example, there might be situations in which branch networks do not overlap significantly but that one or both banks have uneven CRA performance that is not reflected in overall ratings. Alternatively, one of the banks might be exemplary in offering community development finance but it is unclear if the community development staff will be maintained or if a new more centralized method of decision making could imperil the community development program of the resulting bank. Comment letters are likely to raise these and other significant issues that require more investigation facilitated by hearings and meetings.

The proposed policy statement indicates that the FDIC will continue to hold public meetings, public hearings, and private meetings to gather more information and more fully develop the record used by the FDIC for deciding on applications.[22] The policy statement, however, does not indicate the differences among the forums. We suggest that the agency more fully describe the various forums so that members of the public can understand them and have an opportunity to request a particular forum.

In response to Question 23, the ability of the agencies' hearings and meetings to gather information needs to improve in order to more effectively capture the insights of the public. While we support the agencies' efforts to better ascertain from banks' applications the potential adverse impacts and benefits of the transaction, the agencies must also bolster an important role for public comments since neighborhood residents or organizations serving communities are the most credible source of community needs. The hearings and meetings provide opportunities for members of the public to make brief statements, usually a few minutes in length, regarding their views of the proposed merger. While these statements can provide important facts, statements alone do not provide opportunities for members of the public with various views to engage in a robust exchange with bank representatives. A discussion and debate format would provide more information for the agencies to consider merger applications more fully.

NCRC recommends that at the conclusion of witness testimony, the agencies hold two or three panels with an agency official as the moderator and community organizations, bank representatives, and other stakeholders with various perspectives on the merger. Each panel

[21] FDIC proposed statement of policy, p. 29242.
[22] FDIC proposed statement of policy, p. 29231.

would have four or five witnesses. The moderator can ask key questions and provide each witness with a few minutes to state his or her position. After each witness states her or his view, the moderator can allow for another round of statements that offer rebuttals or clarifications of positions stated. This format would generate more information and introduce additional nuance including more options for the agencies to consider. In addition, the panels would help overcome a mere numbers game whereby either the supporters or opponents of the merger try to generate so many witnesses for their side that it appears that only one side has valid views.

The bottom line is that the FDIC should allow for a question-and-answer segment involving the banks' representatives. This will be more effective than only a series of monologues in terms of helping the FDIC get to the bottom of disputes involving significant issues.

The FDIC should develop more transparent mechanisms for soliciting input on merger applications and CRA exams. The agency should develop a public registry in which any member of the public or stakeholder can sign up and indicate their mission and which communities or constituencies they represent. The agency would recruit a diversity of organizations to be on the registry and would routinely inform these organizations of opportunities to comment on CRA exams and merger applications. This would be particularly valuable for recruiting organizations that represent traditionally underserved or marginalized populations including farmworkers, people of color, and poor whites.

Testimony from underserved populations about the value of bank branches and services can be especially powerful and informative regarding any proposed branch closures or other reconfigurations of bank services. The testimony can either convince the applicant to keep branches open or arrange for alternatives to closures such as donations of branches to mission-based lenders like low-income credit unions. These actions may not occur in the absence of testimony from the impacted public.

The FDIC Should Increase the Flow of Information to Improve the Public's Ability to Comment

A merger application process that is fully transparent and that provides timely and comprehensive information will enhance the quality of public comments and thus will also bolster the agency's ability to consider all relevant perspectives and facts. Ultimately, more comprehensive information flows during the application process improve the agency's ability to fully consider the convenience and needs factor.

To this end, we appreciate that the agency is considering enhancing the information on its website concerning merger applications. The FDIC references posting public comments and questions and information requests it poses to the merging banks on its website.[23] In response to Question 26, NCRC urges the agency to do so as well as any bank responses to questions that

[23] FDIC proposed statement of policy, p. 29230.

either the agency or the public pose. The agency should also provide ample time for the public to respond to any bank rebuttals of their comment letters.

The FDIC states that, "The FDIC encourages prospective applicants to engage in a pre-filing process to discuss regulatory expectations. It is particularly important for the application to be substantially complete when initially filed."[24] In some circumstances, NCRC acknowledges that prefiling consultations can prevent applications from being filed that are unduly risky or in which CRA performance needs to dramatically improve before the agency can contemplate an application. However, in other situations, the pre-filing process can unduly influence the agency and pre-dispose it to approving mergers.

In order to prevent abuses, the FDIC has two choices. Either stop holding any pre-filing consultations or be completely transparent. All transcripts of any calls or meetings and any PowerPoints or other materials must automatically become part of the bank applications and are made publicly available during the comment period.

Prompt attention to requests for information during the merger process is imperative for ensuring fairness and the ability of all parties to comment on proposed mergers. Banks often request confidential treatment for significant amounts of information such as which branches will be closed, or which compliance programs would survive that are submitted as part of their merger applications but are not made public. The FDIC should pledge to rule on any Freedom of Information Act (FOIA) requests related to this information between 10 to 15 days before the end of public comment periods or should extend the public comment period in order to accommodate members of the public who wish to access any information that the FDIC deems to be non-confidential.

More Transparency Regarding How Decisions are Made on Application

The public's ability to comment on merger applications would be enhanced not only by an increased flow of information but also a better understanding of the criteria employed by the FDIC to make decisions on applications. The proposed policy statement is silent regarding when conditional approvals and rejections are warranted. Typically, agencies issue conditional approvals when one or both merging banks have CRA performance or fair lending performance that is considerably worse than their peers. Conditional approvals can occur even when the banks have passing CRA ratings but there are significant deficiencies such as the banks trailing their peers by a considerable extent in the percentages of loans made to LMI borrowers or communities or when the banks have significantly higher denial rates to applicants of color than their peers.

For all factors considered in merger applications, including convenience and needs, the FDIC should include guidelines about when performance can merit conditional approval or when applications must be denied. This would help all stakeholders - community organizations and

[24] FDIC proposed statement of policy, p. 29239.

banks alike - better understand the process and agency expectations. Parts of the draft policy statement offer hints about when applications would be denied such as weaker financial condition post-merger or when banks have less than Satisfactory CRA ratings.[25] However, a more systematic presentation could involve a matrix towards the end of the policy statement summarizing bank conditions and performance that would warrant approval, conditional approval, and denials.

Monopolistic or Anticompetitive Effects

Agencies are required to assess whether any adverse effects on the level of competition due to mergers are offset by increased abilities to serve convenience and needs.[26] As the draft policy statement appropriately indicates, the burden on applicants will be high to prove that anti-competitive impacts would be overcome. The policy statement indicates that:

> This creates a heavy burden for the proponents of a merger to support that the benefits to the community outweigh identified anticompetitive concerns. A favorable finding on the convenience and needs of the community to be served factor may not support approval of the application when anticompetitive effects are identified.[27]

The policy statement should make clearer when this would occur. For example, if the merging banks capture more than 30 percent of the county or metropolitan area market (which is forbidden on a state level)[28], then the merger can proceed only if the bank passes specified thresholds on convenience and needs metrics such as increases in loans and investments that significantly surpass past levels of the merging banks and/or recent increases by peer lenders in the impacted counties or metropolitan areas.

The Department of Justice and the Federal Trade Commission (FTC) just tightened its Herfindahl-Hirschman Index (HHI) thresholds to flag mergers for possible anti-competitive impacts when the HHI level is 1,800 and the HHI increases by 100 points after a merger.[29] Would the FDIC apply this threshold on a county or CRA assessment area level and require benefits to increase significantly in geographical areas where the threshold of 100 points is exceeded and the HHI is 1,800? Or if HHI levels and increases in HHI are modestly below threshold levels but a low overall number of branches or banks or lending activity in a locality suggests that the merger may pose a significant anti-trust issue? The FDIC states that it will not

---

[25] FDIC proposed statement of policy, pp. 29229 and 29230.
[26] FDIC webpage section regarding the Federal Deposit Insurance Act, specifically Section 18(c)(5)(B) via https://www.fdic.gov/regulations/laws/rules/1000-2000.html
[27] FDIC proposed statement of policy, p. 29227.
[28] Federal Reserve History, Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, September 1994, https://www.federalreservehistory.org/essays/riegle-neal-act-of-1994
[29] Josh Silver*, Analysis: How Community Groups Can Use The New FTC-DOJ Merger Guidelines To Advance The Just Economy*, NCRC, January 18, 2024, https://ncrc.org/ncrc-summary-of-the-department-of-justice-and-federal-trade-commission-merger-guidelines/

use any bright lines for anti-competitive situations[30] but thoughtful guidelines create more certainly for stakeholders. The FDIC would be on solid ground if its guidelines were consistent with the new DOJ and FTC guidelines.

Pricing information is also important information for which to consider anti-competitive impacts. The FDIC indicates an openness to using pricing information.[31] This would be consistent with the DOJ and FTC guidelines that a history of fee increases and less favorable interest rates on loans and deposits for a particular bank or locality after previous mergers would be important factors in anti-trust analysis.[32]

In response to Question 6, NCRC is pleased that the FDIC proposes employing a variety of data sources when it conducts its anti-competitive analysis.[33] While deposits may be sufficient in some markets, loan and other products may be a more accurate measure of the level of competition, particularly if one or more of the banks in the merger application specialize in lending or some other activity as opposed to deposit-taking. Also, it is appropriate as the FDIC indicates to consider credit unions, fintechs, and other types of institutions[34] that are actual competitors to the merging banks rather than to only focus on depository institutions, which is an outmoded method of analysis that does not take into account changes in the financial marketplace over the last few decades.

In response to Questions 12 and 13, it would be appropriate to consider the level of competition in banks' CRA assessment areas. These are either areas that banks themselves consider important to their business or in the case of retail assessment areas are areas with substantial amounts of bank retail lending. In addition, in response to Question 15, the FDIC can probe for disparate impacts to rural areas, minority and lower income areas by employing an anti-competitive analysis on a county level and capturing county level demographics such as median income levels or percentage of people of color or low- and moderate-income people. Further, in certain circumstances when overall HHI or market concentration levels increase significantly in particular metropolitan areas or counites, it would be useful to look at the HHI or market concentrations in LMI tracts or majority minority tracts to either consider additional divestitures or mandate commitments to increase lending and banking services to these traditionally underserved communities.

NCRC appreciates that the FDIC indicates that remedies to significant decreases in competition include divestitures of branches, business lines or portions thereof.[35] This flexibility can account for a variety of situations. For example, branching may not be an anti-trust issue in a locality but

[30] FDIC proposed statement of policy, p. 29227.
[31] FDIC proposed statement of policy, p. 29241.
[32] Josh Silver*, Analysis: How Community Groups Can Use The New FTC-DOJ Merger Guidelines To Advance The Just Economy*
[33] FDIC proposed statement of policy, pp. 29227-29228.
[34] FDIC statement of policy, p. 29228.
[35] FDIC statement of policy, p. 29241.

a bank that specializes in a certain type of lending such as home improvement lending could tip the market into an oligopolistic situation. At the same time, NCRC urges the FDIC to be sensitive to traditionally underserved communities when requiring divestitures. To the extent possible, mission-based institutions such as Community Development Financial Institutions, low-income credit unions, minority- or women-owned banks should acquire the branches or products at a discount. These mission-based lenders have a special commitment to serve LMI or communities of color and thus, these divestitures should result in product availability for the long term in these communities.

Lastly, NCRC appreciates that the FDIC included in the draft policy statement a prohibition against non-compete clauses when the merging banks sell branches or product lines to other banks in order to alleviate anti-trust concerns.[36] Non-compete clauses would frustrate the purposes of divestiture which is to ensure robust competition post-merger.

Financial and Managerial Resources

Considering the failures of Silicon Valley Bank (SVB) and Signature Bank, the FDIC astutely emphasizes that an overuse of uninsured deposits presents undue risk such as lack of liquidity. Narrow product lines and a limited clientele also need to be counterbalanced with sound and diversified finances. In this vein, the recently proposed merger of Capital One and Discover Financial Services would exacerbate the riskiness of narrow product lines, particularly credit card and automobile lending. The outstanding loan amounts in the merged bank would become much larger while also exhibiting high delinquency rates associated with subprime lending. Narrow product lines can also be inconsistent with meeting credit needs of all communities, particularly in cases in which banks do not make efforts to ensure that products can serve all segments of the community, including those with modest incomes. For example, a home equity or home improvement loan specialist can run afoul of CRA if its products favor the well-heeled and do not include options for those with more basic needs such as weatherization.

The policy statement indicates that "an IDI's overreliance on uninsured deposits or non-core funding sources may not be consistent with a favorable finding on this statutory factor."[37] The FDIC's statement generally shies away from bright lines but historical experience with non-insured deposits should indicate percentages of non-insured deposits that are likely to result in heightened risk. It would be at least helpful to review instances of high percentages of uninsured deposits and whether these resulted in failure or impaired condition.

NCRC urges the FDIC to include in its policy statement a requirement that banks describe their efforts to promote gender, racial, and ethnic diversity in their boards, senior management, and branch personnel. Studies have indicated that increasing the presence of women in leadership

[36] FDIC statement of policy, p. 29241.
[37] FDIC statement of policy, p. 29229.

positions is associated with lessening risk and improvements in financial performance.[38] The FDIC should require banks to produce statistics describing the demographic breakdown in their management ranks. Promoting diversity including at the branch and loan officer level is likely to also improve a bank's ability to market to and serve communities of color and underserved communities.

Risk to the Stability of the United States Banking or Financial System

NCRC's supports the FDIC's criteria for assessing the risk to the stability of the banking system. These include the size of the banks in the proposed merger, the availability of substitute providers for critical products to be offered by the merged banks, the merged banks degree of interconnectedness with the banking system, the extent to which the merged banks add to the financially system's complexity, and the extent of the merged banks cross border activities.[39]

A helpful addition to the policy statement's discussion of these factors would be to indicate that concern is heightened if more than one of these factors is present and may interact with each in unhealthy ways. For example, if a large bank provides infrastructure for the banking sector at large and has large cross border operations, this bank's application proposes concerns for three of the factors and its harmful impact due to a failure may be exponentially greater than a bank that presents concern for only one of the factors.

NCRC also agrees with the FDIC that concern should be heightened in cases in which banks have $100 billion or more in assets. The failures of SVB and Signature with assets of about this level put the entire financial system on edge for several weeks. If enforcement had been more stringent regarding these banks during previous mergers, this stressful situation may have been avoided. The heavy use of uninsured deposits seems particularly unfathomable. One wonders whether these bankers did not attend Banking 101 in business school.

Conclusion

The draft FDIC policy statement would be a significant improvement over the current statement that has not been updated in decades. It would help facilitate discussions and negotiations between merging banks and community-based organizations over how to realize public benefits post-merger and increase reinvestment activity. More explicit recognition of community benefit agreements would further enhance the possibilities that the merger would realize public benefits.

We also appreciate the clarity that the FDIC expects more loans and other bank services at reasonable prices after mergers. Our comment provides recommendations about including more

---

[38] Iness Aguir, Narjess Boubakri, Miriam Marra, Lu Zhu, *Gender diversity in leadership: Empirical evidence on firm credit risk*, Journal of Financial Stability, Volume 69, December 202, https://doi.org/10.1016/j.jfs.2023.101185; Remarks for an IMF/IFC Seminar, IMF First Deputy Managing Director David Lipton, *Boosting Growth Through Diversity in Financial Leadership,* April 13, 2019, https://www.imf.org/en/News/Articles/2019/04/13/sp041319-boosting-growth-through-diversity-in-financial-leadership

[39] FDIC statement of policy, p. 29232.

criteria the FDIC should consider when reviewing the convenience and needs and anti-trust factors so that mergers have a better chance of public benefits exceeding anti-competitive harms. Likewise, our recommendations regarding financial and managerial factors are geared to making banks more financially sound and better able to respond to communities' needs with inclusive product delivery.

Thank you for the opportunity to comment on this important matter. If you have any questions, please contact me at jvantol@ncrc.org or Josh Silver, Senior Fellow, at jsilver97@gmail.com.

Sincerely,

Jesse Van Tol
President and CEO

Organizations signing onto the letter

National

African American Alliance of CDFI CEOs
Consumer Action
National Housing Resource Center

Alabama

Birmingham Business Resource Center
Building Alabama Reinvestment
IGNITE! Central
NAACP
Roosevelt Southwest Community Development Corporation

Arizona

Local First Arizona
Prestamos CDFI

California

California Coalition for Rural Housing
California Community Economic Development Association
Friends of the Public Bank East Bay
ICA Fund
Logan Heights Community Development Corporation
NID Housing Counseling Agency
People's Opportunity Fund
Public Bank East Bay
The Greenlining Institute

Colorado

Neighborhood Development Collaborative
NeighborWorks Southern Colorado

District of Columbia

CARECEN-Central American Resource Center
Coalition for Non Profit Housing and Economic Development

Florida

Community Reinvestment Alliance of Florida
Metro North Community Development Corporation
REACH

Georgia

Georgia Advancing Communities Together, Inc.

Hawaii

Self-Help Housing Corporation of Hawaii

Illinois

Housing Action Illinois
Universal Housing Solutions CDC

Indiana

South Bend Heritage

Kentucky

Louisville Urban League

Louisiana

Habitat for Humanity St. Tammany West

Maryland

Community Development Network of Maryland
Housing Initiative Partnership

Maine

Coastal Enterprises, Inc.

Michigan

Thredz
Wayne Metropolitan Community Action Agency

Missouri

R.A.A. - Ready Aim Advocate

Mississippi

St Paulette CDC

North Carolina

Piedmont Business Capital
Reinvestment Partners
Welfare Reform Liaison Project, Inc.

New Mexico

Santa Fe Habitat for Humanity

New York

Alternatives Federal Credit Union

Ohio

Economic and Community Development Institute
Housing Opportunities Made Equal of Greater Cincinnati
Working In Neighborhoods

Oregon

CASA of Oregon
Housing Oregon
Proud Ground

Pennsylvania

Ceiba
PCRG
Philadelphia Legal Assistance
Pittsburgh Community Reinvestment Group

Texas

Harlingen Community Development Corporation
Johnson Consulting Group
Legacy
South Dallas Fair Park Innercity Development Corporation
Southern Dallas Progress Community Development Corporation
SouthFair Community Development Corp

Washington

African Community Housing & Development

Wisconsin

Habitat for Humanity of the Greater La Crosse Region
Metropolitan Milwaukee Fair Housing Council