U.S. Chamber of Commerce

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James P. Sheesley
Assistant Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street N.W.
Washington, D.C. 20429

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

Dear Assistant Executive Secretary Sheesley:

The U.S. Chamber of Commerce ("Chamber") believes the Federal Deposit Insurance Corporation's ("FDIC") proposed statement of policy on bank merger transactions ("Proposal" or "SOP") lacks statutory authority, is substantively and procedurally deficient, and is unnecessary. This proposal could distort the market forces resulting in the combination of banks and could undermine the institutions which the FDIC oversees.

If the FDIC were to move forward and finalize the Proposal, we urge you to consider and resolve the following issues:

- Any guidance on bank mergers should be proposed through an interagency process after the U.S. Department of Justice's ("DOJ") review is completed;
- In order to reduce the chilling effect on bank mergers and decrease the likelihood of arbitrary decision-making, any final SOP should establish clear guidelines and a predictable merger review process;
- The FDIC should continue its long-standing practice of allowing applicants to withdraw merger applications without risk of public criticism by the agency;
- A final SOP should establish clear thresholds for transactions that do not raise financial stability concerns;
- A final SOP should not seek to impose "single point of entry" or other resolution requirements; and
- A final SOP should explicitly require the FDIC to consider the regulatory framework of the resulting institution but also articulate how any financial stability concerns are not addressed by the existing framework;

- Transactions should not impose additional requirements beyond the current test to meet the convenience and needs of the community to be served; and

- The level of agency involvement in the community benefit agreements is unwarranted.

Our concerns are listed in greater detail below.

I. Significant Benefits of Bank Mergers

As noted, the Proposal risks upending a pro-competitive merger regime that has yielded significant benefits to financial stability and consumers. As discussed more fully in our 2024 white paper, *Antimerger Regulatory Proposals Threaten U.S. Financial Markets* ("2024 White Paper")[1] and elsewhere, the current landscape for banking and financial products is highly competitive, which is due in large part to the current regulatory regime for bank mergers. In contrast, the Proposal would discourage bank mergers,[2] helping to reshape the current landscape into a "barbell" banking sector composed almost entirely of community banks and global systemically important banks ("GSIBs").

The existing regulatory regime for mergers and acquisitions has substantially increased competition in credit markets over the last quarter century.

The consumer credit market has seen new entrants, innovative products, aggregate growth, reinvention of incumbents and the decline or departure of companies that could not keep pace or maintain necessary economies of scale. A recent study found that bank output was "supercompetitive" and that bank fees declined from 1984-2016.[3] For example, bank branches and ATMs have increased by the tens of thousands, expanding banking to underserved communities and bringing banks closer to consumers in large markets. In addition, online banks, and the expanded geographic reach of brick-and-mortar banks with an online presence, also have significantly expanded competition in credit markets. Consumers also have other choices to find credit, including from certain retailers, auto lenders and other non-depository lenders.

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[1] *See* U.S. Chamber of Commerce, *Antimerger Regulatory Proposals Threaten U.S. Financial Markets* (June, 2024), *available at https://www.uschamber.com/finance/antimerger-regulatory-proposals-threaten-u-s-financial-markets-has-context-menu?x-craft-preview=sAZAdkaw94&token=VXJ5tCzp--SYLD93VmnXmAVmj36koQuS.*

[2] *See infra* Sections II through IV.

[3] *See* Slade Mendenhall, *Commercial Bank Competition, Riegle-Neal, and Dodd-Frank* (June 10, 2019), *available at* https://deliverypdf.ssrn.com/delivery.php?ID=862024094122115081094086127014013007102003037074039062086007069064098091028067097031038026119061045028111090290130830920860191170750460370761180850921070661061270250010890671260281240180800131210901180811000990160730030730750260071020710240250730070 83&EXT=pdf&INDEX=TRUE.

Bank mergers have helped to facilitate this competitive landscape.

Mergers can free resources to protect consumer data and defend against cyberattacks, to invest, particularly in lower-income communities, and to improve customer products, such as digital services. The DOJ has recognized that the "great majority of bank mergers do not cause antitrust concerns" and that a bank merger can allow "the merging firms to achieve significant economies of scale or scope," thereby offering consumers lower costs and/or improved services.[4]

Both financial institutions and consumers can benefit from scale. For example, after Congress allowed banks to operate across state lines, many banks merged in ways that allowed them to compete more broadly and effectively in more of the country. Digitization, for instance, requires major investments in fixed capital and ongoing investments in digital security. Scale also can help to ameliorate compliance burdens and the need for lower-cost deposit funding. At the same time, smaller banks often have difficulty attracting the necessary talent to deal with ever-changing risks. Ultimately, acquisitions can allow acquirors with greater managerial and financial resources than their targets to better or more quickly resolve existing problems and identify strategic opportunities.[5]

In addition to enhancing competition, bank mergers can improve financial stability.

A merger can broaden the combined institution's capital base and liquidity position. In particular, bank mergers help smaller and regional banks to compete effectively with the largest global-systemically important banks, and with other institutions that offer credit, thereby increasing consumer choice and reducing the risk of financial instability. Numerous studies have concluded that bank mergers promote competition and allow institutions to offer a wider range of products and services.[6] Similarly, in recent comments in response to the 2023 bank failures, Treasury Secretary Janet Yellen acknowledged that "more consolidation in the

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[4] *See* DOJ, *Address by Anne K. Bingaman before the Comptroller of the Currency's Conference on Antitrust and Banking* (November 16, 1995), *available at* https://www.justice.gov/atr/speech/antitrust-and-banking.

[5] *See* Bank Policy Institute, *Financial Stability Considerations for Bank Merger Analysis* (May 16, 2022) at 6-7, *available at* https://bpi.com/wp-content/uploads/2022/05/Financial-Stability-Considerations-for-Bank-Merger-Analysis.pdf.

[6] *See* Shradha Bindal, Christa H.S. Bouwman, Shuting (Sophia) Hu and Shane A. Johnson, *Bank Regulatory Size Thresholds, Merger and Acquisition Behavior, and Small Business Lending*, 62 J. Corp. Fin. 1 (2020) (noting that mergers facilitate economies of scale in terms of regulatory compliance); Charles W. Calomiris, *Gauging the Efficiency of Bank Consolidation During a Merger Wave*, 23 J. of Banking and Fin. 615 (1999) (noting that, for several decades, banks grew in size and complexity so as to capture economies of scope and to offer an increasingly complex array of products and services). *See also* U.S. Chamber, at https://www.uschamber.com/assets/documents/220215_Comments_BankMergerReview_DOJ.pdf.

banking industry could be healthy."[7] Secretary Yellen pointed out that "[w]e have more banks, relatively speaking, in the United States than almost any country of which I'm aware."[8] In the same vein as Secretary Yellen, and undermining the notion that dramatic regulatory changes are needed, Federal Reserve Board of Governors Chair Jerome Powell recently noted that "[t]he U.S. banking system is sound and resilient, with strong levels of capital and liquidity."[9]

According to recent data, many aspects of the banking and finance sectors have become less concentrated since the early 2000s.

Although some regulators contend that bank mergers have raised concentration levels, as we discuss in further detail in the 2024 White Paper, the data show otherwise. A recent study found that many aspects of the banking and finance sectors have become less concentrated since 2002. In particular, the commercial banking, credit card issuing, and consumer lending sectors have all experienced a decline in concentration. Moreover, most mergers involve smaller banks, which allows for more competition at scale and should therefore lessen any concerns about concentration.

In any event, numerous studies have found that industry concentration is not a reliable measure for assessing competition in a given market, as described in our 2024 White Paper. Furthermore, studies have found no correlation between bank mergers and branch closures.[10] Rather, the data clearly show that, in the last two decades, competition has increased substantially in credit markets, that many aspects of the banking and finance sectors have become less concentrated, and that mergers can enhance competition and financial stability. Particularly on the last point, top policymakers, from a former head of DOJ's Antitrust Division to the current Secretary of the Treasury, have publicly recognized the benefits of bank mergers, as noted above.

[7] Andrew Duehren, *Janet Yellen Sees Bank Earnings Pressure, Mergers After March Crisis* (June 23, 2023), *available at* https://www.wsj.com/articles/yellen-says-more-bank-mergers-likely-this-year-96f69e73?mod=hp_lead_pos5.

[8] *Id.*

[9] Board of Governors of the Federal Reserve System, Joint Press Release, *Statement by Chair Jerome H. Powell* (July 27, 2023), *available at* https://www.federalreserve.gov/newsevents/pressreleases/powell-statement-20230727.htm.

[10] *See, e.g.*, Bank Policy Institute, *Exposing Some Serious Untruths About Bank Mergers, Bank Branches and Banking Access* (January 18, 2022), *available at* https://bpi.com/wp-content/uploads/2022/01/Exposing-Some-Serious-Untruths-About-Bank-Mergers-Bank-Branches-and-Banking-Access.pdf.

Fundamentally, the Proposal could radically change the U.S. financial sector into a "barbell" banking sector.

As explained in our 2024 White Paper, the Proposal would encourage a "barbell" banking sector composed almost entirely of community banks on one end and GSIBs on the other. In a recent interview, former FDIC Chair Sheila Bair explained that an antimerger agenda could reduce the financial stability of regional banks and thereby reduce competition for larger banks:

> *I'm very concerned about current efforts to discourage M&A activity among regional banks.... We should be doing just the opposite. If we want to prevent regional failures, we should be encouraging the healthy ones to buy the weaker ones and not the opposite direction which is what we're doing.*[11]

As most mergers involve community and mid-sized banks, which are already experiencing significant business and compliance challenges, additional obstacles to mergers will largely be felt by such smaller banks.[12] As the Chamber has cited in past studies and comment letters regional banks are an important providers of financial services for small and medium-sized businesses and collateralized deposits for local governments and nonprofits. An anti-merger agenda discourages investment, particularly in technology, and pushes customers to seek capital outside the banking system.

II. Appropriate Processes and Protections

As discussed below, any final SOP should be conducted through appropriate interagency processes and include current procedural protections for applicants.

Any guidance regarding the Bank Merger Act should be proposed through an interagency process after the Department of Justice's review is completed.

In order to ensure the consistency of bank merger reviews, any final SOP should be proposed through an interagency process. As is the case with capital, liquidity, and other regulatory requirements generally applicable to insured depository institutions ("IDIs"), review of Bank Merger Act guidelines should also be conducted

[11] Steve Gelsi, *Ex-FDIC Chair Sheila Bair says it's wrong for regulators to "discourage" regional bank mergers* (March 29, 2024), *available at* https://www.marketwatch.com/story/ex-fdic-chair-sheila-bair-says-its-wrong-for-regulators-to-discourage-regional-bank-mergers-d03db057.

[12] *See* Bank Policy Institute and Mid-Size Bank Coalition of America (February 10, 2022) at 3, *available at* https://bpi.com/wp-content/uploads/2022/02/2022-BPI-and-MBCA-response-to-DoJ-call-for-comments.pdf.

jointly to ensure evaluations of mergers under the Bank Merger Act do not arbitrarily vary based on the reviewing regulator. While the Bank Merger Act is implemented by the three U.S. federal banking agencies—the Federal Reserve Board of Governors, the FDIC and the Office of the Comptroller of the Currency ("OCC")— and the agency responsible for regulatory approval largely depends on the type of entities involved in the transaction, Congress has prescribed the same factors for review by each agency and the same process for review by each agency.

Thus, there is intentionally no variation in the law regarding agency evaluation of bank mergers. This consistency should be carried through to the agencies' implementation of the Bank Merger Act not only to follow Congressional intent but also because a lack of consistency in agency review can lead to numerous problems. For example, variation among agencies' review of bank mergers can create confusion and result in unnecessary complexity due to the multiple sets of agency rules implementing the Bank Merger Act. Variation can also lead to forum shopping, which may artificially skew the distribution of types of bank charters established due to factors other than state or federal law, physical geography, or other business reasons. Variation can also be (or be perceived to be) arbitrary, calling into question the credibility of agency decision-making.

The banking agencies have recognized the problems associated with variation in agency review of bank mergers and value consistency, as evidenced through the agencies' history of jointly issued regulations and guidance, such as capital rules, liquidity rules, and interagency guidelines on third-party risk management. Moreover, the DOJ and federal banking agencies jointly issued the current bank merger guidelines in 1995, indicating recognition, even almost 30 years ago, of the benefits of a clear and consistent framework.

Courts have similarly recognized the problems associated with variation among agency interpretations. For example, courts have refused to grant *Chevron* deference to conflicting interpretations of the same statute by different agencies, though consistent interpretations among the agencies may still be awarded *Chevron* deference.[13]

Any final SOP regarding competition should also take into account the DOJ's recommendations, in consultation with the banking agencies, under the 2021 Executive Order on Promoting Competition in the American Economy (the "2021

[13] *See* Kristin E. Hickman & Richard J. Pierce, Jr., *Administrative Law Treatise*, Seventh Edition, Volume 1, Chapter 3.6.2.

EO").[14] The 2021 EO established a "whole-of-government effort" to promote American economic competitiveness and included 72 initiatives spanning more than a dozen federal agencies to address challenges hindering competition across the U.S. economy. With respect to bank mergers, the 2021 EO encourages the DOJ and federal banking agencies to update relevant guidelines to provide "more robust scrutiny of mergers". This process is underway, with the DOJ's Antitrust Division having already issued two requests for public comment on whether and how it should revise its bank merger competitive review guidelines.

The DOJ and federal banking agencies have taken a collaborative approach to fulfilling their obligations under the 2021 EO. In 2023, for example, Assistant Attorney General Jonathan Kanter remarked that the DOJ "look[s] forward to continuing to collaborate with the talented leadership and staff of the Federal Reserve, FDIC and Office of the Comptroller of the Currency on new [b]ank [m]erger [g]uidelines" and that DOJ and federal banking agency "staffs have been engaged in productive discussions".[15] In January of this year, Acting Comptroller of the Currency Michael Hsu similarly reported that the OCC is "committed to working with our interagency peers to update our bank merger analytical frameworks, including collaboration with the [DOJ] on the competition prong of the Bank Merger Act" and "[t]hat work is ongoing."[16]

Given the ongoing 2021 EO process, it is difficult at this stage to meaningfully comment on the competitive factors of the Proposal. The 2021 EO process may prompt the FDIC to revise its view on competition. At a minimum, the review would be an attempt to shift the legal landscape surrounding bank merger review to the extent the DOJ's review process is amended. Therefore, it is not helpful or productive at this stage to engage in the comment process with respect to the Proposal as it relates to competition, given that the bank merger review landscape may soon change as a result of the DOJ's and banking agencies' current efforts regarding the 2021 EO.[17]

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[14] *See Executive Order on Promoting Competition in the American Economy*, White House (July 9, 2021), *available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

[15] *See* Jonathan Kanter, *Merger Enforcement Sixty Years After Philadelphia National Bank*, Keynote Address at the Brookings Institution's Center on Regulation and Markets Event, "Promoting Competition in Banking" (June 20, 2023), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-address-brookings-institution.

[16] *See* Michael J. Hsu, *What Should the U.S. Banking System Look Like? Diverse, Dynamic, and Balance*d, University of Michigan School of Business (January 29, 2024), *available at* https://www.occ.gov/news-issuances/speeches/2024/pub-speech-2024-6.pdf.

[17] To be clear, we are not advocating for the FDIC to incorporate into any final SOP any changes that the DOJ ultimately adopts or endorsing any such changes. Rather, we are emphasizing that before substantive comments can be made regarding the Proposal's competition review, any such changes to the DOJ's review process must be analyzed and considered.

To reduce the chilling effect on bank mergers and decrease the likelihood of arbitrary decision-making, any final SOP should establish clear guidelines and a predictable Bank Merger Act review process.

The Proposal seeks to provide new guidance without clear thresholds or metrics, which would ultimately increase uncertainty surrounding the FDIC's Bank Merger Act review process and have a chilling effect on bank mergers. Any changes to a regulatory regime are undoubtedly accompanied by uncertainty, as it takes time for the market to observe how the changes are implemented and amend its practices to comply with such changes. The Proposal is in sharp contrast to the current bank merger review landscape, in which market participants have decades of reliable precedent and past practice.

Guidance can on balance result in greater certainty or clarity by establishing clear guidelines (*e.g.*, thresholds) on which agencies may base their decisions, as long as any such guidelines are not treated as binding.[18] However, rather than establishing clear guidelines, the Proposal defers to agency discretion. For example, the Proposal states that it does not provide "any bright lines or specific metrics for which it is presumed that [a] transaction would be considered anticompetitive"[19] and instead, that each transaction must be evaluated on the facts and circumstances presented in the application, with any determination on the filing specific to that transaction—in other words, wholly according to agency discretion[20]. In numerous instances, rather than resolving an issue and setting forth clear expectations, the Proposal states that its determination will depend on the "facts and circumstances" of the proposed transaction.

This general uncertainty and lack of clear guidelines would likely chill bank merger activity and potentially lead to greater likelihood of arbitrary analysis and decision-making by the FDIC. We recognize the flexibility that the Proposal aims to preserve by deferring to agency discretion; however, as currently proposed, this flexibility is not accompanied by sufficient guidelines to help ensure that the agency will apply the same analysis in a consistent manner across different transactions. Both the risk of arbitrary agency decision-making, as well as the general uncertainty which inevitably surrounds a change in regulatory expectations (as discussed above),

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[18] *See, e.g.*, 12 CFR Part 302, Appendix A (Statement Clarifying the Role of Supervisory Guidance).

[19] *See* 89 Fed. Reg. 29222 at 29227 (April 19, 2024).

[20] It is important to again underscore that the FDIC does not have a statutory mandate to examine anticompetitive effects, but instead only to evaluate questions as to whether the merger might have an impact on financial stability, an analysis that is outside the purview of a competition analysis.

could create an undue chilling effect. Moreover, the Proposal does not establish a factual, empirical, or other basis that explains why the FDIC should be granted such vast discretion in the bank merger consideration process while giving so little concrete guidance to applicants.

The FDIC should continue the banking agencies' longstanding practice of allowing applicants to withdraw Bank Merger Act applications without risk of public criticism by the agency.

Permitting bank merger applicants to withdraw their merger applications without being subject to public agency criticism has been a reliable practice at the federal banking agencies for decades—and for good reason. There is significant value in this approach. Public statements from an agency describing why an application would have been denied or divulging the agency's concerns pose significant reputational harm to a bank. Although such public statements should not disclose confidential information, the lack of relevant information may actually lead the public to assume the worst about the bank's confidential supervisory ratings or similar confidential supervisory matters. This can be particularly troublesome for a company that is registered with the U.S. Securities and Exchange Commission. This risk of public criticism by an agency would also significantly chill bank merger activity.

The ability to apply under the Bank Merger Act without this risk is necessary due to the inherent uncertainty regarding the application process. Applicants cannot predict how an agency will make many of its determinations, given agency discretion and novel issues that applications raise. (This function would be even more important under the Proposal due to the additional uncertainty it would create, as discussed above). Similarly, events may occur after a bank merger application is submitted that may affect the analysis of the proposed transaction or the viability of the original proposal. In other words, the ability to withdraw without a public denial or public criticism allows applicants to reduce the inherent uncertainty associated with submitting an application without significantly increasing the applicant's reputational risk.

Such public criticism is also unnecessary. Any concerns or lessons learned from the FDIC's review of a proposed transaction can be disclosed through generalized agency guidance, which would provide the same benefits to the public as any statements identifying a specific applicant or transaction. Thus, statements and guidance that are more broadly applicable can be made via generalized guidance documents or other generalized agency statements. If there are issues or concerns relevant only to a particular transaction and not generally applicable, then there is no need to publicly release such statements. Ultimately, public agency criticism regarding a specific transaction presents significant downside risks with no attendant advantages.

III. Comments Regarding the Proposal's Financial Stability Analysis

As discussed below, any final SOP should establish clear thresholds for transactions that would be presumed to not raise financial stability concerns. In addition, any final SOP should not seek to use the Bank Merger Act as a backdoor method of making *ad hoc* revisions to resolution planning requirements or enhanced prudential standards.

Any final SOP should establish clear thresholds for transactions that do not raise financial stability concerns.

The Proposal provides that the FDIC will not view the size of the entities involved in a proposed merger transaction as the sole basis for determining financial stability risk and adds that "transactions that result in a large IDI (*e.g.*, in excess of $100 billion) are more likely to present financial stability concerns."[21] Although a question in the Proposal refers to this statement regarding resulting institutions of $100 billion as a "size threshold", it is not clear in the proposed SOP whether it is merely presented as a parenthetical *example* of a "large IDI".[22] In other words, it is not clear from the proposed guidance language that a size threshold is established or what crossing such a threshold entails.

For the reasons described in Section II above, we encourage the FDIC to provide clear guidance to the public regarding its Bank Merger Act analysis and, therefore, to clarify the significance of the $100 billion asset size of the resulting institution. Moreover, also as described in Section II, we encourage the FDIC to act consistently with other banking agencies when establishing the $100 billion threshold. Specifically, shortly after the Dodd-Frank Wall Street Reform and Consumer Protection Act was enacted, the Federal Reserve Board of Governors established, and has consistently held, a presumption that a resulting institution of less than $100 billion in assets does not raise financial stability concerns.[23] For consistency and clarity, we believe the FDIC should likewise clarify in any final SOP that the $100 billion threshold is a threshold under which applications would be presumed to not raise financial stability concerns. Such a formulation is also

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[21] *Id.* at 29243.

[22] *See id.* Question 31 at 29235.

[23] *See, e.g.*, Fed. Res. Order No. 2024-02 (April 11, 2024).

consistent with the current framework for applying enhanced prudential standards, which begin to apply at $100 billion in total consolidated assets.[24]

Any final SOP should likewise explicitly recognize that not all merger transactions where the acquirer or resulting institution is above $100 billion in assets raise financial stability concerns. Specifically, we encourage any final SOP to include a presumption that *de minimis* acquisitions (*i.e.*, $10 billion, or less) do not raise new financial stability risks or otherwise materially affect the acquirer's financial stability profile. This presumption has also been well-established by the Federal Reserve Board of Governors, and its application here would likewise promote clarity and consistency.

Any final SOP should not seek to impose "single point of entry" or other resolution requirements under the Bank Merger Act.

The Proposal states that the "FDIC may not be able to find favorably on [the financial stability] factor when the resultant IDI's organizational and funding structure preclude its ability to: (i) continue operations and activities until they can be sold or wound down, (ii) sell key business lines or large asset portfolios, *and* (iii) be marketed for sale in a manner that limits the potential for losses to the Deposit Insurance Fund."[25] It also confirms that the FDIC will consider as part of this analysis resolution scenarios that do not involve the receivership of the IDI.[26] The Proposal therefore strongly implies that the FDIC may not approve a proposed transaction under the Bank Merger Act unless the resulting institution—and the banking organization of which it would be a part—would be able to implement a "single point of entry" resolution strategy and other discrete elements of resolution planning regulations and guidance applicable to the largest banking organizations.[27]

We agree that large depository organizations should be able to comply with the resolution planning requirements and expectations applicable to them—both before and after a merger. However, it is not appropriate, as a matter of law or policy, for the FDIC to impose resolution planning requirements through the Bank Merger Act. When enacting the Dodd-Frank Act, Congress clearly gave the FDIC and the Federal Reserve Board of Governors joint authority to implement resolution planning requirements and review resolution plans under section 165(d) of the Act (12 U.S.C.

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[24] *See, e.g.*, 84 Fed. Reg. 59230 (Nov. 1, 2019).

[25] 89 Fed. Reg. 29222 at 29243 (April 19, 2024) (emphasis added).

[26] *See id.*

[27] *See, e.g.*, 12 CFR part 252, subpart G; 84 Fed. Reg. 1438 (Feb. 4, 2019).

§ 5365(d)). Current resolution planning requirements and expectations have largely been set through regulations and guidance subject to notice and comment under section 165 of the Dodd-Frank Act.[28] Moreover, current and proposed requirements have been generally applicable (*i.e.*, not institution-specific) and proposed jointly or with close interagency coordination.

The FDIC's imposition of resolution planning requirements under the Bank Merger Act could not be more different. Whereas Congress provided the Federal Reserve Board of Governors and the FDIC resolution planning authorities under section 165(d) of the Dodd-Frank Act, it provided them no such authorities under section 604 (*i.e.*, the provision of the Dodd-Frank Act that included the financial stability factor in the Bank Merger Act).[29] Similarly, unlike section 165(d) and certain other statutes, the Bank Merger Act provides no review regarding the banks' holding company structure. Moreover, imposition of resolution planning requirements under the Bank Merger Act by the FDIC is inconsistent with the joint resolution planning responsibilities Congress gave the FDIC and Federal Reserve Board of Governors. Such single-agency action also risks the imposition of inconsistent or conflicting resolution planning requirements.

In addition, imposing resolution planning requirements through the Bank Merger Act would necessarily be conducted in an *ad hoc* manner. This would have the effect of establishing different resolution planning standards among similarly situated institutions based only on whether they had a merger transaction approved by the FDIC, arbitrarily differentiating among institutions and establishing an unlevel playing field.

Finally, such requirements would not be imposed through a notice and comment process. The benefits of notice and comment rulemaking are numerous and have been well-articulated by others. For example, notice and comment rulemaking leads to higher-quality rules than *ad hoc* policy decision-making, enhances political accountability, provides numerous efficiency advantages to the agency and public and is considered fairer in a number of respects (*e.g.*, avoids disparate temporal impact and inconsistencies between different proceedings).[30] As resolution planning developed since the Dodd-Frank Act, the banking agencies have increasingly relied

[28] Certain rulemakings, such as requirements regarding long-term debt, have been proposed by one or more banking agencies using authorities outside of section 165(d) of the Dodd-Frank Act. *See, e.g.*, 88 Fed. Reg. 64524 (Sept. 19, 2023); 82 Fed. Reg. 8266 (Jan. 24, 2017). These rulemakings were also conducted through notice and comment and were either proposed jointly or through interagency consultation. *Id*.

[29] *See, e.g.*, *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 378 (1954).

[30] *See* Hickman & Pierce, *Administrative Law Treatise* at Chapter 4.8.

on notice and comment in establishing resolution planning requirements and expectations. Implementing resolution planning requirements through *ad hoc* decision-making in Bank Merger Act applications threatens to undermine much of the procedural (and even substantive) progress made by the agencies and large banks.

When assessing financial stability, any final SOP should not only explicitly require the FDIC to consider the regulatory framework of the resulting institution but also articulate how any financial stability concerns are not addressed by the existing framework.

In addition to the enumerated items the FDIC would evaluate as part of its financial stability analysis, the Proposal adds that the "FDIC will evaluate any additional elements that may affect the risk to the U.S. banking or financial system's stability. This may include the resulting IDI's regulatory framework; however, the framework alone would not result in a favorable finding on this factor when other financial stability concerns exist."[31]

As an initial matter, the Proposal does not require the FDIC to consider the resulting IDI's regulatory framework. Banks and the banking agencies have engaged in continuous, extensive efforts since the passage of the Dodd-Frank Act to implement a host of new and stronger prudential standards to significantly reduce financial stability risk. To not consider this regulatory framework when assessing financial stability, the FDIC not only would ignore the important and significant factors affecting the resulting IDI's financial stability risks but also simply be a refusal to recognize reality. Therefore, any final SOP should make clear that the FDIC *will* consider the resulting IDI's regulatory framework when assessing financial stability risk.

Any final SOP should also amend and explain (or, alternatively, delete) the statement that the regulatory "framework alone would not result in a favorable finding on this factor when other financial stability concerns exist." As noted, the regulatory framework implemented since the Dodd-Frank Act has significantly reduced and mitigated the risk that large banking organizations had posed to financial stability. Moreover, it has largely been implemented through interagency coordination and notice and comment. A decision by a single agency that the current regulatory framework is now insufficient to address financial stability risk with respect to a resulting IDI could have significant detrimental consequences—namely, it could call into question the efficacy of the current regulatory framework, create arbitrarily

[31] 89 Fed. Reg. 29222 at 29243 (April 19, 2024).

inconsistent regulatory standards among the banking agencies and establish an unlevel playing field among IDIs.

As such, any finding that the current regulatory framework is insufficient to address financial stability risk should be carefully considered and reluctantly made. At a minimum, any final SOP should, before making such a determination, require the FDIC to articulate in detail how the regulatory framework for the IDI is insufficient to address financial stability risks of the resulting IDI and clarify that "other financial stability concerns" refers to risks that are unique to the merger itself (*e.g.*, would not be present in the same institution that had grown organically instead of through the proposed merger).

IV. Comments Regarding the Proposal's Analysis of Convenience and Needs

As discussed below, any final SOP should not diverge from the statutory basis for the convenience and needs factor or its historic implementation by the FDIC.

It is inappropriate to add "better" to the convenience and needs factor.

The Proposal correctly notes that the "Bank Merger Act requires the responsible agency to consider the convenience and needs of the community to be served when evaluating a merger transaction."[32] However, it adds that 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."[33]

As an initial matter, we note that banks have a long tradition of serving their respective communities. They have been, and continue to be, highly regulated stewards of economic growth, contributing to the expansion of economic opportunity for the communities they serve.

Further, the proposed "*better*" addition is not based in statute and has no clear justification. With the "better" provision, FDIC may have exceeded its statutory authority under the Bank Merger Act. There is no requirement in the Bank Merger Act that resulting institutions better meet the needs of the communities served, only that the FDIC must "take into consideration" the convenience and needs of the communities served.

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[32] *Id.* at 29242.

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

Likewise, the proposed "*better*" addition appears inconsistent with the FDIC's historical or proposed approach to its consideration of the other factors. Rather, the FDIC, like other banking agencies, generally determines whether the application is consistent with previous merger approvals. The "better" provision establishes a dangerous precedent that could lead to an unreasonably (if not impossibly) high bar for merger applications, especially if imposed on multiple factors.

Moreover, the proposed addition "*better*" is unjustified. The Proposal does not explain why the resulting institution should better meet the convenience and needs of the community to be served. In other words, there is no provided rationale for this decision and therefore none that could be evaluated (as rational or arbitrary).[34]

Lastly, it is unclear how any consideration of "*better*" in this context, without specific metrics or other measurable objectives, could be anything but arbitrary and capricious in its application. To the extent any final SOP does not provide such a rationale because the proposed "better" requirement is intended to be an articulation of existing FDIC precedent and expectations, the SOP should clearly state so. To help ensure that potential applicants may understand and meet such a requirement, any final SOP should likewise clarify the FDIC's expectations regarding it by indicating that the list of public benefits following the requirement (*e.g.*, higher lending limits and greater access to existing products and services) would generally satisfy the requirement.

The level of agency involvement in the community benefit agreements is unwarranted and unprecedented.

The Proposal notes that "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 IDI's adherence with any such claims and commitments."[35] The Proposal goes on to say that "[n]on-standard conditions may be imposed in response to … bank commitments[] or public comments."[36] Although the FDIC may, of course, consider agreements with community groups in connection with the merger, it would set a dangerous precedent in our federal administrative process to condition the approval on community benefit agreements (or payments to any one organization) or to require the bank to provide related commitments to the FDIC. Banks have worked directly and cooperatively with

[34] *See, e.g.*, *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

[35] 89 Fed. Reg. 29222 at 29424 (April 19, 2024).

[36] *Id.*

community groups for decades to provide meaningful and increasingly large investments in communities. For example, in connection with PNC's acquisition of BBVA USA, PNC announced an $88 billion community benefits plan in 2022 aimed at bolstering economic opportunity for low- to moderate-income ("LMI") individuals, communities and people of color. Also in 2022, U.S. Bancorp launched a $100 billion community benefits plan in connection with its acquisition of MUFG Union Bank, and in 2020, SunTrust and BB&T launched a $60 billion community benefits plan targeted toward LMI borrowers and communities in connection with their merger. Therefore, additional disclosures or regulatory scrutiny may not provide substantive benefit to the public and could, in fact, act as a detriment by, for example, discouraging candid discussions with community groups.

Similarly, banks have ensured their continued compliance with such commitments without regulatory involvement, and community groups currently have recourse for noncompliance, including by noting noncompliance in future merger proposals or other strategic plans by the banking organization.[37]

FDIC supervision of compliance with such commitments would therefore add no benefit but would add burden to both the bank and the FDIC as well as make the FDIC a *de facto* enforcer of a negotiated contractual instrument between willing private parties. The FDIC would be required to assess compliance with commitments the agency did not draft and which it has no experience examining. The FDIC would also become a *de facto* arbiter of any disputes that arise between banks and community groups regarding compliance with the commitments—a burdensome role and one clearly outside the FDIC's statutory duties.

* * *

Bank mergers and acquisitions play a pivotal role in the competitiveness and health of both our financial institutions and overall economy. Indeed, these transactions have allowed for banks to offer a wider variety of products to their communities while strengthening our financial system. The FDIC and other prudential regulators have an important mandate to ensure a stable and vibrant financial system.

This Proposal threatens to disrupt necessary and appropriate mergers by implementing arbitrary and opaque policies that burden applicants and potentially diverge from the FDIC's statutory authority. We urge the FDIC to make changes to the Proposal and focus on building a bank merger regulatory framework that has clear

[37] *See, e.g.*, Fed. Res. Order, Bank of America Corporation/FleetBoston Financial Corporation 51 (2000). Commenters urged the Federal Reserve Board of Governors to withhold approval of the application until the applicant satisfied certain community commitments made in connection with a prior merger application. *Id.*

metrics and encourages the growth of healthy financial institutions. Furthermore, we encourage the FDIC to collaborate with the Federal Reserve, OCC, and DOJ to create uniform guidelines that would provide certainty in the application process.

Sincerely,

Tom Quaadman
Executive Vice President
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce