June 18, 2024

James P. Sheesley, Assistant Executive Secretary
Attention: Comments-RIN: 3064-ZA31
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: Request for Comment on Proposed Statement of Policy on Bank Merger Transactions; RIN: 3064–ZA31; 89 FR 29222 (Apr. 19, 2024)

Dear Mr. Sheesley:

Better Markets[1] appreciates the opportunity to comment on the proposed statement of policy ("Proposal") from the Federal Deposit Insurance Corporation ("FDIC" or "Agency") that would be relevant for all merger transactions ("mergers") involving an FDIC-insured depository institution ("Bank").[2] The Agency describes the Proposal as principles-based, broadly reflecting the regulatory, legislative, and industry changes since the last statement of policy was published 27 years ago, in 1997, and amended in 2002 and 2008.[3] The Proposal is separate and distinct from the Office of the Comptroller of the Currency ("OCC") proposal on merger transactions that was announced in February 2024, and on which Better Markets also commented.[4]

1 Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

2 Request for Comment on Proposed Statement of Policy on Bank Merger Transactions; RIN 3064-ZA31; 89 FED. REG. 29222 (Apr. 19, 2024), https://www.federalregister.gov/documents/2024/04/19/2024-08020/request-for-comment-on-proposed-statement-of-policy-on-bank-merger-transactions.

3 *See* Bank Merger Transactions; 63 FED. REG. 44761 (Aug. 20, 1998), https://www.federalregister.gov/documents/1998/08/20/98-21489/bank-merger-transactions; FDIC Statement of Policy on Bank Merger Transactions, 67 FED. REG. 48178 (July 23, 2002), https://www.federalregister.gov/documents/2002/07/23/02-18493/fdic-statement-of-policy-on-bank-merger-transactions; FDIC Statement of Policy on Bank Merger Transactions, 67 FED. REG. 79278 (Dec. 27, 2002), https://www.federalregister.gov/documents/2002/12/27/02-31919/fdic-statement-of-policy-on-bank-merger-transactions; Statement of Policy on Bank Merger Transactions, 73 FED. REG. 8871 (Feb. 15, 2008), https://www.federalregister.gov/documents/2008/02/15/E8-2885/statement-of-policy-on-bank-merger-transactions.

4 Business Combinations Under the Bank Merger Act; RIN: 1557–AF24; Document Number OCC-2023-0017; 89 FED. REG. 10010 (Feb. 13, 2024), https://www.federalregister.gov/documents/2024/02/13/2024-02663/business-combinations-under-the-bank-merger-act; *see also* Better Markets Comment Letter, *Business Combinations Under the Bank Merger Act* (June 14, 2024), https://bettermarkets.org/wp-content/uploads/2024/06/Better-Markets-Comment-Letter-OCC-Business-Combinations-Under-the-Bank-Merger-Act.pdf.

This Proposal describes the FDIC's expectations for mergers in the context of five statutory factors:

- Monopolistic or anticompetitive effects;
- Financial resources, managerial resources, and future prospects;
- Convenience and needs of the community to be served;
- Risk to the stability of the US banking or financial system; and
- Effectiveness in combatting money laundering activities.[5]

The Proposal also details its jurisdiction and scope as any merger that involves a Bank.[6] This includes mergers in which the target is a nonbank but the acquiring, assuming, or resulting institution is a Bank. It also includes transactions that are mergers in substance—in which the target no longer competes in the market—regardless of the speed or timing of the ultimate dissolution of the target entity.

We fully support the broadened scope and jurisdiction of the Proposal. Nonbanks have become a prevalent and dominant force in the financial system.[7] Therefore, it is critically important to have clear rules to maintain appropriate regulatory oversight and consumer protection when they combine with Banks. However, the Proposal misses the mark relative to the strong and enforceable rules needed to govern mergers. While the Proposal attempts to improve upon the 1997 Statement of Policy by specifying, for example, that the resulting Bank would need to ***better*** meet the convenience and needs of the community and be financially ***stronger*** than the original entity, it lacks specific metrics and details that are needed for regulators, banks, and the public to oversee and understand what is and is not acceptable for merger transactions. As a result, like the OCC's proposed policy statement,[8] this Proposal moves in the wrong direction by codifying a set of broad and vague statements rather than defining specific guidelines to govern bank mergers.

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5 Request for Comment on Proposed Statement of Policy on Bank Merger Transactions, *supra* note 2 at 29240-44.

6 *Id*. at 29238-39.

7 According to the Financial Stability Board, nonbanks collectively had more than $200 trillion in total assets and account for about half of global financing activities in 2022, the latest data available. *See* FINANCIAL STABILITY BOARD, GLOBAL MONITORING REPORT ON NON-BANK FINANCIAL INTERMEDIATION 3 (Dec. 18, 2023), https://www.fsb.org/2023/12/global-monitoring-report-on-non-bank-financial-intermediation-2023/.

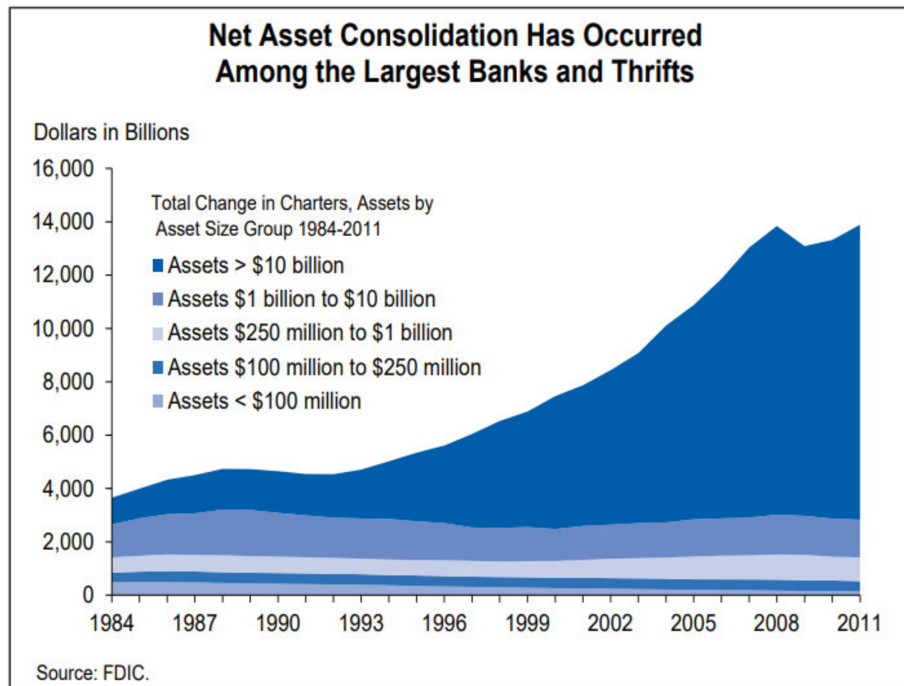
8 Better Markets Comment Letter, *supra* note 4.

BACKGROUND

An insufficient merger review process, combined with changes in laws and economic events, has contributed to massive consolidation in the banking industry over the past several decades.[9]

Since the mid-1980s, the number of commercial banks in the US has declined by roughly 70 percent.[10] This consolidation has overwhelmingly occurred among the largest institutions (see Chart 1).[11] Between 1984 and 2011, the number of institutions with total assets of $10 billion or more increased from 32 to 107 but the assets that these institutions controlled grew from about $1 trillion (27% of total industry assets) in 1984 to $11.1 trillion (80% of total industry assets) by 2011.[12] The four Wall Street megabanks account for much of this growth, increasing from an aggregate market share of just 6.2 percent of total banking industry assets in 1984 to more than 40% of industry assets by 2011, in part because of the direct acquisition of 353 other banks with combined total assets of $2.5 trillion.[13]

Chart 1



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9 *See, e.g.*, Better Markets Fact Sheet, *The Review Process for Bank Mergers and Acquisitions Is Seriously Deficient, Allows Too-Big-to-Fail to Proliferate, and Fails to Protect Consumers* (July 11, 2023), https://bettermarkets.org/wp-content/uploads/2023/07/Better_Markets_Merger_Fact_Sheet-7.11.23.pdf.

10 Federal Deposit Insurance Corporation, *BankFind Suite: Find Annual Historical Bank Data*, https://banks.data.fdic.gov/bankfind-suite/historical (last accessed Apr. 4, 2024).

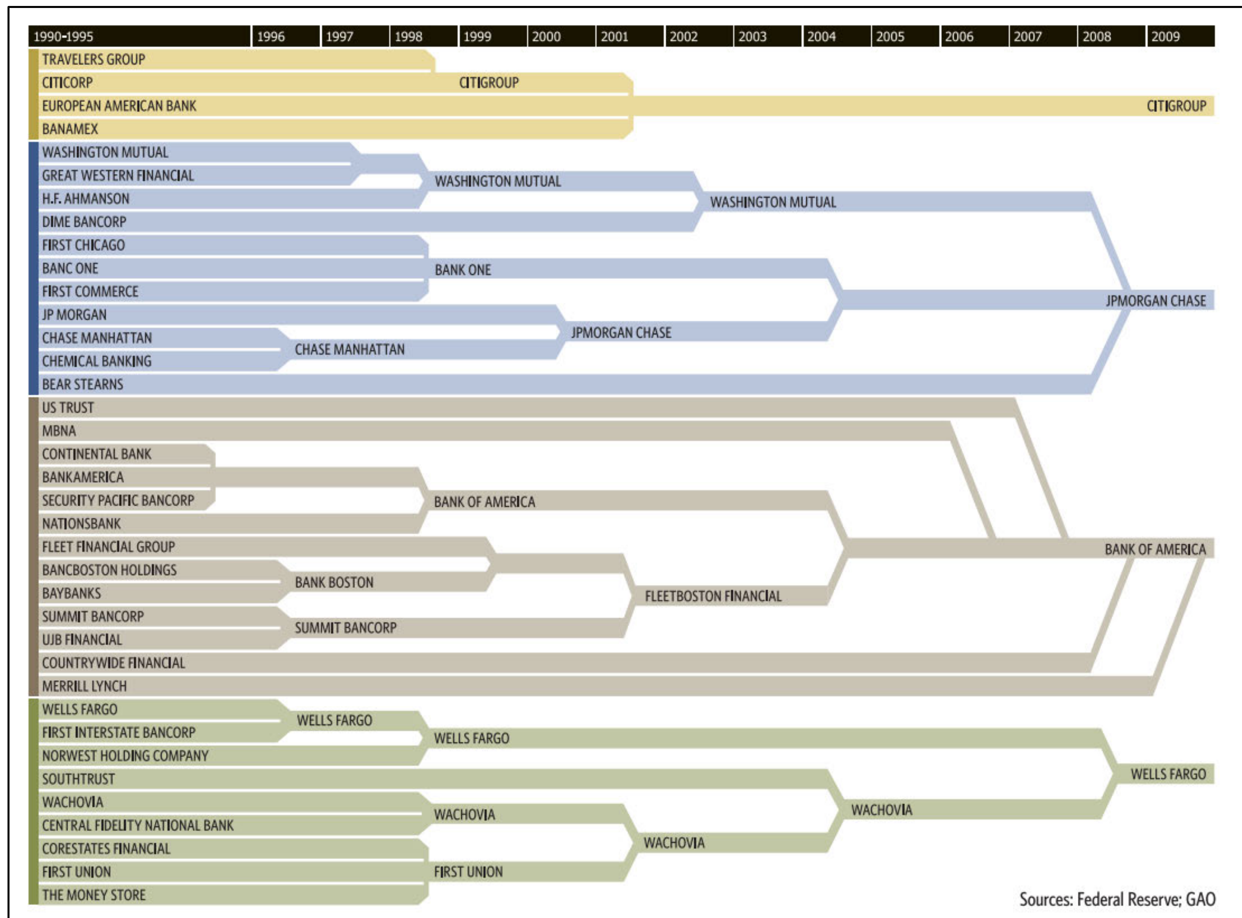
11 FEDERAL DEPOSIT INSURANCE CORPORATION, FDIC COMMUNITY BANKING STUDY § 2.3 (Dec. 2012), https://www.fdic.gov/resources/community-banking/report/2012/2012-cbi-study-full.pdf.

12 *Id*. at § 2.2 – 2.3.

13 *Id*. at § 2.4.

The pace of mergers increased substantially after Congress passed a law in 1994 that codified the right to interstate banking at a national level.[14] That consolidation became a frenzied merger wave after the 1999 Gramm-Leach-Bliley Act[15] repealed the portion of the Glass-Steagall Act of 1933[16] that required the separation of commercial banking, investment banking, and insurance, resulting in more than 30 banks being merged into just four gigantic, too-big-to-fail ("TBTF") banks by the time of the 2008 financial crisis ("2008 Crash") (See Chart 2).[17]

Chart 2



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[14] The Riegle-Neal Interstate Banking and Branching Efficiency Act, 12 USC § 1811.

[15] The Gramm-Leach-Bliley Act, 15 USC § 6801-6809.

[16] The Glass-Steagall Act of 1933, Public Law No. 66-73D.

[17] *How Banks Got Too Big to Fail*, MOTHER JONES (Jan./Feb. 2010), https://www.motherjones.com/politics/2010/01/bank-merger-history/.

Then, the 2008 Crash resulted in government-brokered takeovers of large, failing Wall Street banks by already TBTF banks. Finally, in spring 2023, bank consolidation was made worse when regulators facilitated the acquisition of the three failed institutions, including allowing the largest US bank, JPMorgan Chase, to get even bigger.[18]

Confidential, back-room practices at the banking regulatory agencies that encourage and effectively grease the skids to make approval of merger applications a near certainty have also contributed to the merger volume:

> [A]gencies have encouraged consolidation . . . by manipulating their application procedures to cater to the banking sector. In the late 1990s, the agencies effectively stopped denying merger applications. Instead, when an agency discovers a problem with a merger proposal, it now informs the applicant of the issue and gives the bank an opportunity to withdraw its application. A voluntary withdrawal shields the bank from bad publicity and the negative market reaction a public denial might cause. This informal process, however, leaves no publicly available, written record of the deficiencies in the merger proposal. . . .
>
> The most significant end-run around the application process, however, occurs before a bank even executes a merger agreement. It is now common practice for the banking agencies to allow firms to vet potential deals confidentially before announcing a merger. In these private meetings, a bank may ask regulators whether they foresee potential barriers to approval of a transaction. If regulators raise a concern about a proposal, the bank might not pursue the merger. But when regulators express no reservations, the bank may enter into a merger agreement with the agencies' implicit blessing.[19]

Overwhelming evidence proves that mergers present serious risks and costs to financial stability as well as consumers. For example, research from the Federal Reserve and other academics concludes:

> ***[D]istress at a single large bank poses a significantly greater threat to the economy than distress at several smaller banks with equivalent total assets.*** Meanwhile, large bank mergers pose serious integration risks and tend not to deliver promised efficiency gains or public benefits. Moreover, numerous empirical

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[18] *See* Press Release, Federal Deposit Insurance Corporation, *JPMorgan Chase Bank, National Association, Columbus, Ohio Assumes All the Deposits of First Republic Bank, San Francisco, California* (May 1, 2023), https://www.fdic.gov/news/press-releases/2023/pr23034.html; Press Release, Federal Deposit Insurance Corporation, *First–Citizens Bank & Trust Company, Raleigh, NC, to Assume All Deposits and Loans of Silicon Valley Bridge Bank, N.A., From the FDIC* (Mar. 26, 2023), https://www.fdic.gov/news/press-releases/2023/pr23023.html; Press Release, Federal Deposit Insurance Corporation, *Subsidiary of New York Community Bancorp, Inc., to Assume Deposits of Signature Bridge Bank, N.A., From the FDIC* (Mar. 20, 2023), https://www.fdic.gov/news/press-releases/2023/pr23021.html.

[19] Jeremy C. Kress, *Modernizing Bank Merger Review*, 37 YALE J. ON R. 435, 456–57 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3440914.

> studies have found that bank mergers lower the availability and increase the cost of credit for borrowers, especially small businesses. And merging banks typically close branches, inconveniencing customers who rely on proximity to branch offices. In this light, the banking agencies' recent track record of quickly approving nearly every merger proposal suggests that they are neglecting their responsibility to consider all the statutory factors as Congress intended.[20]

President Biden's 2021 Executive Order on Promoting Competition in the American Economy also detailed many detrimental impacts of consolidation throughout the economy, including in banking and the financial industry.[21] That order directed the Attorney General to engage with the banking regulatory agencies to review guidelines around bank mergers to update and revitalize the merger oversight process.

The facts prove that this review and additional regulatory attention are warranted. Census Bureau data show that the finance and insurance industry is the fourth most concentrated among all industries, with the top 50 firms having a market share above 45%.[22] The finance and insurance industry is large and diverse, however, with a range of different firms so it is more informative to examine market share measures for banks specifically. Data from the Federal Reserve Bank of New York show that the degree of industry concentration is actually even higher for banks alone, with the top 50 firms consistently having more than 80% of industry assets since 2008 (see Chart 3).[23]

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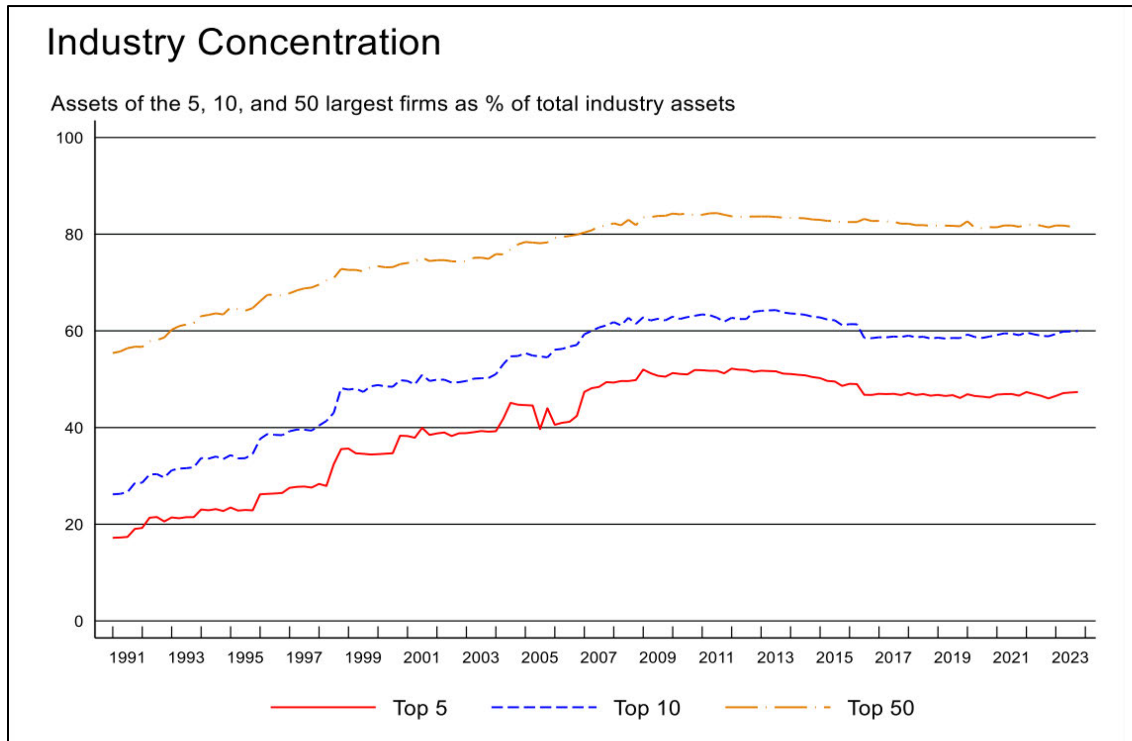
[20] *Id*. at 439–40; s*ee also* Amy G. Lorenc & Jeffery Y. Zhang, *The Differential Impact of Bank Size on Systemic Risk* 12-18 FED. RESERVE BD. FIN. & ECON. DISCUSSION SERIES (2018), https://www.federalreserve.gov/econres/feds/the-differential-impact-of-bank-size-on-systemic-risk.htm; Arthur E. Wilmarth, Jr., *Too Big to Fail, Too Few to Serve? The Potential Risks of Nationwide Banks*, 77 IOWA L. REV. 957, 1010–12 (1992); Erik Devos et al., *Efficiency and Market Power Gains in Bank Megamergers: Evidence from Value Line Forecasts*, 45 FIN. MGMT. 1011, 1029 (2016).

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

[22] Statista, *Combined Market Share of the Largest Firms in Their Respective Industries in the United States as of 2017*, https://www.statista.com/statistics/1339853/market-concentration-industry-us/ (last accessed Apr. 9, 2024).

[23] FEDERAL RESERVE BANK OF NEW YORK, QUARTERLY TRENDS FOR CONSOLIDATED U.S. BANKING ORGANIZATIONS 37 (Fourth Quarter 2023), https://www.newyorkfed.org/research/banking_research/quarterly_trends.html.

Chart 3



In response to this problem, the Department of Justice ("DOJ") issued a request for information from the public in 2021 to gather perspectives on whether and how the merger review process could be improved.[24] Better Markets responded to this request urging the DOJ and the banking regulatory agencies to work together to modernize and strengthen the merger review guidelines, specifically enhancing the assessment of servicing community needs and financial stability concerns.[25] In a June 20, 2023, speech, Jonathan Kanter, Assistant Attorney General for Antitrust at the DOJ, said that the DOJ would increase its scrutiny of mergers and consider additional measures of competitiveness in its analysis. Kanter also said that the DOJ would focus on providing advisory opinions and empower the financial regulators to conduct broader merger reviews.[26]

The FDIC also increased its focus on merger policy, first with a Request for Information and Comment ("RFI") on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank

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[24] *See* Better Markets Comment Letter, *Request for Comment on Whether and How the Antitrust Division Should Revise the 1995 Bank Merger Competitive Review Guidelines* (Feb. 15, 2022), https://bettermarkets.org/wp-content/uploads/2022/02/Better-Markets-Comment-Letter-Bank-Merger-Guidelines.pdf.

[25] *Id*.

[26] *See* Remarks by Assistant Attorney General Jonathan Kanter, U.S. Department of Justice, *Promoting Competition in Banking* (June 20, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-address-brookings-institution.

Merger Transactions in March 2022.[27] Better Markets responded to that request with several key points, centered around the need for the FDIC to work with the other federal banking regulatory agencies to modernize and strengthen merger review guidelines, including:

- Consider a broad set of factors beyond competition when assessing potential mergers;
- More seriously consider the risk to financial stability as a result of the merged institution;
- Be willing to deny approval for mergers with identified weaknesses; and
- Enhance the public interest and convenience and needs of underserved communities when reviewing merger applications.[28]

However, the FDIC and other federal regulatory agencies have nonetheless too often overlooked or downplayed the risks of consolidation and harmful outcomes of mergers that endanger the economy, financial system, and the American public. For example, the FDIC failed to act in response to New York Community Bank's application to acquire Flagstar Bank.[29] After a year of no response, despite reports that indicate the FDIC had serious concerns about fair lending failings at Flagstar Bank, the banks changed their strategy and charter to petition the OCC for merger approval, which was eventually granted. More clear and decisive actions to convey the FDIC's concern would have possibly prevented the regulatory arbitrage that occurred in this case and stopped fair lending violations that cause harm to innocent consumers. Furthermore, such action and regulator coordination could have prevented the systemic risk that Flagstar Bank now presents to the financial system and the American people, after its mergers with both New York Community Bank and Signature Bank.

Additionally, JPMorgan's acquisition of the failed First Republic Bank on May 1, 2023,[30] which resulted in JPMorgan growing by more than $220 billion, is another prime example of the

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[27] Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions; RIN 3064-ZA31; 87 FED. REG. 18740 (Mar. 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.

[28] Better Markets Comment Letter, *Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions* (May 31, 2022), https://bettermarkets.org/wp-content/uploads/2022/05/Better_Markets_Comment_Letter_Request_for_Comment_Bank_Merger_Transactions.pdf.

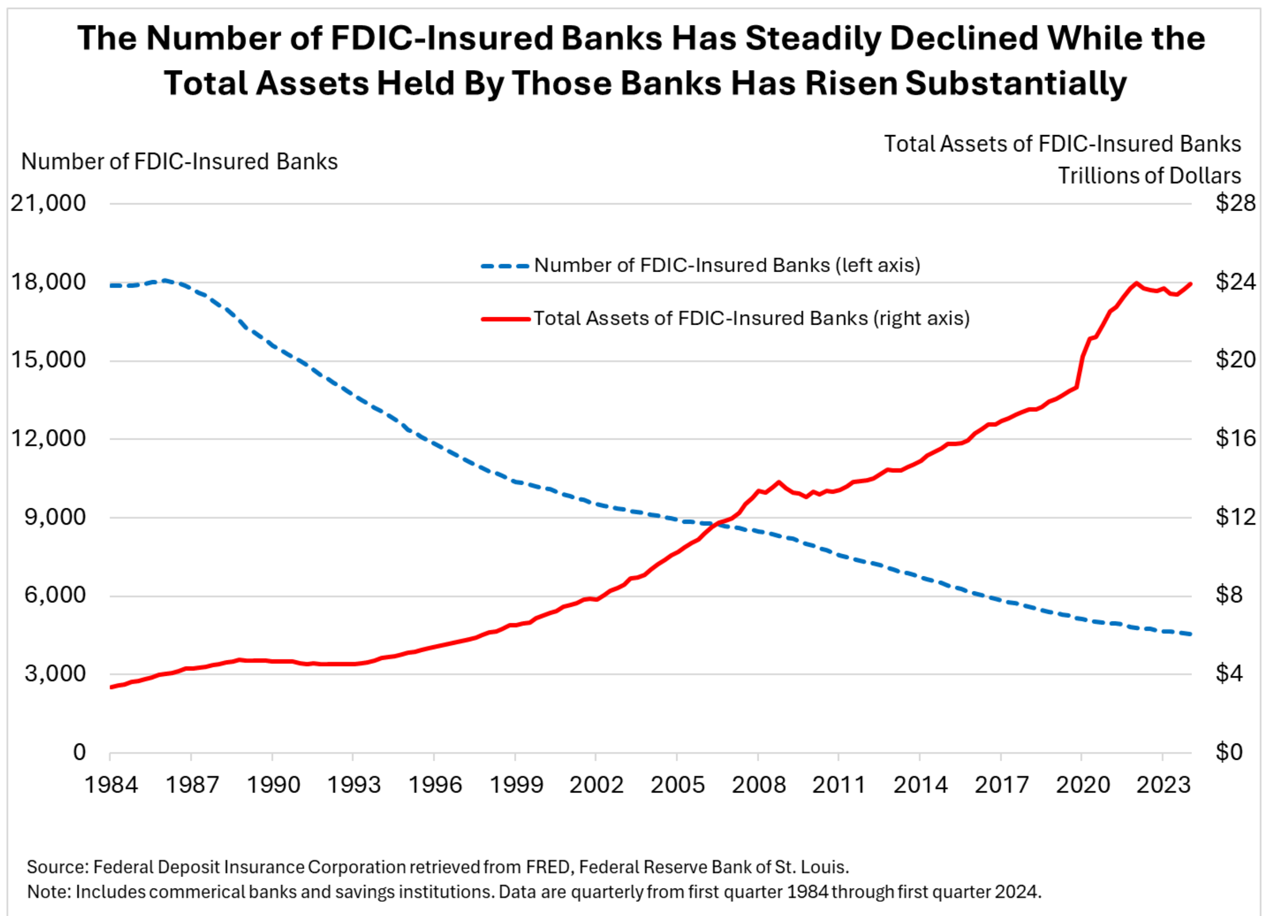
[29] *See e.g.,* Better Markets, *New York Community Bancorp: A Frankenstein Monster Federal Regulators Created* (Mar. 1, 2024), https://bettermarkets.org/wp-content/uploads/2024/03/Fact-Sheet-NYCB-Flagstar-Update-3-1-2024.pdf; *Flagstar Bancorp/New York Community Bancorp: When FDIC Rebuffed Merger Bid, Banks Restructured Deal So OCC Would Review It*, THE CAPITOL FORUM (Oct. 18, 2022), https://thecapitolforum.com/flagstar-bancorp-new-york-community-bancorp-when-fdic-rebuffed-merger-bid-banks-restructured-deal-so-occ-would-review-it/.

[30] *See* Press Release, Federal Deposit Insurance Corporation, *JPMorgan Chase Bank, National Association, Columbus, Ohio Assumes All the Deposits of First Republic Bank, San Francisco, California*, *supra* note 18.

need for stronger merger policy and coordination among the agencies. In this case, the OCC concluded that the merger transaction "does not increase risk to the stability of the United States banking or financial system as it facilitates the orderly resolution of an insured depository institution in default" and that the standard 10% deposit concentration limitation does not apply because First Republic Bank was in receivership.[31]

Data show a decades-long trend of consistent decline in the number of FDIC-insured banks, alongside steady growth in total assets held by those banks (see Chart 4).[32]

Chart 4



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31 *Application by JPMorgan Chase Bank, National Association, Columbus, Ohio, Charter Number 8 to purchase certain assets and assume certain liabilities of First Republic Bank, San Francisco, California*, Office of the Comptroller of the Currency (May 1, 2023), https://www.occ.gov/topics/charters-and-licensing/app-by-jp-morgan-chase-bank.pdf.

32 Federal Deposit Insurance Corporation, *Balance Sheet: Number of Institutions Reporting*, FRED, FEDERAL RESERVE BANK OF ST. LOUIS (June 13, 2024) https://fred.stlouisfed.org/series/QBPBSNUMINST; Federal Deposit Insurance Corporation, *Balance Sheet: Total Assets*, FRED, FEDERAL RESERVE BANK OF ST. LOUIS (June 13, 2024) https://fred.stlouisfed.org/series/QBPBSTAS.

In 1984, there were nearly 18,000 banks that together held less than $4 trillion in aggregate assets. By 2023, there were about 4,500 institutions that together held about $24 trillion in aggregate assets.[33] ***This growth reflects the dangerous increase in TBTF banks that present serious threats to financial stability.***

Treasury Secretary Janet Yellen has also supported consolidation, including for the largest TBTF banks. For example, in a meeting with bankers including megabank CEO Jamie Dimon, Yellen said she would welcome more mergers.[34] In a separate speech, Yellen said that she expects to see more mergers and that more consolidation in the banking industry could be healthy:

> We certainly don't want overconcentration and we're pro-competition, but that doesn't mean no mergers, she said. We have more banks, relatively speaking, in the United States than almost any country of which I'm aware.[35]

Overall, the important and unique role that banks play in the financial system, along with their inherent riskiness, justifies elevated scrutiny beyond companies in other industries.[36] This scrutiny protects the public and limits negative externalities.[37] Therefore, it is imperative that the FDIC not miss the current opportunity with this Proposal to fortify its merger policy to protect financial stability and the American public.

SUMMARY OF THE PROPOSAL

As referenced earlier, the Proposal[38] would replace the FDIC's current Statement of Policy and guide the Agency with all merger transactions. It defines the scope of mergers that would be covered by the new policy and provides a principles-based overview of the Agency's responsibilities related to mergers.

The Proposal clarifies that FDIC approval is required for a broad range of merger transactions, including those between two Banks, but also including those in which a Bank:

- merges or consolidates with any non-insured bank or institution;

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33 *Id.*

34 Rob Copeland, *'Do You Even Want Us to Exist?' A Bank Chief Fights to Survive*, N.Y. TIMES (June 14, 2023), https://www.nytimes.com/2023/06/14/business/western-alliance-regional-banks.html.

35 Andrew Duehren, *Janet Yellen Sees Bank Earnings Pressure, Mergers After March Crisis*, THE WALL STREET J. (June 23, 2023), https://www.wsj.com/articles/yellen-says-more-bank-mergers-likely-this-year-96f69e73.

36 *See, e.g.*, E. Gerald Corrigan, *Are Banks Special?*, Federal Reserve Bank of Minneapolis (Jan. 1, 1983), https://www.minneapolisfed.org/article/1983/are-banks-special; Mehrsa Baradaran, *Banking and the Social Contract*, 89 NOTRE DAME L. REV. 1283 (2014), https://scholarship.law.nd.edu/ndlr/vol89/iss3/6.

37 Kress, *supra* note 19 at 466.

38 Request for Comment on Proposed Statement of Policy on Bank Merger Transactions, *supra* note 2 at 29222.

- assumes liability to pay any deposits or similar liabilities in a non-insured bank or institution; or

- transfers assets to any non-insured bank or institution in consideration of an assumption of deposit liabilities of the Bank.[39]

The Proposal emphasizes substance over form with the definition of transactions that are covered, stating that this is not an exhaustive list of specific transactions and that Banks cannot evade oversight by delaying the consummation of a merger or limiting it to bank products that are not traditional deposits, such as trust or escrow funds.

The Proposal also outlines the specific statutory factors that the FDIC considers in its evaluation of merger applications:

- **Monopolistic or Anticompetitive Effects:** The FDIC is prohibited from approving mergers that result in a monopoly or substantially lessen competition, unless the anticompetitive effects are outweighed by the public interest or convenience and needs of the community that is served. The Proposal acknowledges comments from the earlier RFI that asked for specific guidelines or benchmarks in relation to this analysis but says that none are being provided to maintain flexibility and allow for specific evaluation of the facts and circumstances of each application[40]

- **Financial Resources and Managerial Resources and Future Prospects:** The FDIC will consider a range of financial and managerial data and performance information for each entity involved in a merger transaction. The Proposal again recognizes that RFI comments asked for specific metrics related to these measures but states that the decision to not include such metrics was intentional to provide flexibility to evaluate each individual merger. However, it does state that the resulting entity must be ***stronger*** than the original entity and that the FDIC is unlikely to find favorably on a merger that results in a larger or financially weaker Bank.[41]

- **Convenience and Needs of the Community to Be Served:** The FDIC will consider how the post-merger entity will meet the needs of the community it serves. This is described as a broad consideration, including factors such as Community Reinvestment Act ("CRA") ratings as well as branch locations and banking services provided. However, like the other statutory factors, despite comments to the prior RFI, there are no metrics or benchmarks for this factor beyond the FDIC's expectation that the post-merger entity will ***better*** meet the convenience and needs of the community than without the merger.[42]

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[39] *Id*. at 29224.

[40] *Id*. at 29227-28.

[41] *Id*. at 29229-30.

[42] *Id*. at 29230-31.

- **Risk to the Stability of the United States Banking or Financial System:** The FDIC will consider the risk that the resulting Bank presents to the US banking and financial system, including the size of entities involved, availability of substitute providers for critical services, the interconnectedness of the resulting entity, complexity of the resulting entity, and cross border activities. Like the other statutory factors, specific metrics or benchmarks are not provided for these items. However, the FDIC does point to banks with more than $100 billion in total assets as requiring more scrutiny but also says that size is not the sole basis for evaluating this factor.[43]

- **Effectiveness in Combatting Money Laundering Activities:** The FDIC expects that the resulting bank will have a satisfactory anti-money laundering and countering the financing of terrorism program commensurate with its risk profile and business or strategic plan. Like the other statutory factors, despite comments on the RFI to set specific limits on misconduct that is or is not acceptable and time frames that will be assessed, the FDIC specified that no limits are included to remain flexible in the assessment of each merger.[44]

Finally, the Proposal acknowledges comments on the prior RFI that encouraged the FDIC to work with other Federal agencies, including the Consumer Financial Protection Bureau, when assessing mergers. The FDIC does not provide details but said that this collaboration will occur with both state and federal counterparts.[45]

<u>SUMMARY OF COMMENTS</u>

As stated, we support the specific details provided in the Proposal for the FDIC's scope and jurisdiction with regard to mergers. However, the Proposal's principles-based approach used to address the statutory factors is insufficient. It creates loopholes for mergers to be approved based on agency discretion and may create at least the impression of, if not the true existence of, favoritism toward certain banks or business models. Ultimately, this lack of clarity threatens financial stability and consumer protection, which is completely unacceptable. Former FDIC Chair Sheila Bair and Former FDIC Vice Chair Thomas Hoenig characterize these risks as follows:

> [U]nder the [Statement of Policy's] umbrella standard of 'flexibility' within the process, the FDIC will become increasingly discretionary in its review of [bank] mergers. This can only lead applicants to search for the most well-connected law or consulting firms to manage them through the process to approval. Such an approach would become arbitrary and inconsistent, dependent on those in power,

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[43] *Id*. at 29231-35.

[44] *Id*. at 29235.

[45] *Id*.

not on established specific criteria determined through research and the rule of law.[46]

To actually strengthen the FDIC's merger assessment and approval process, which is the stated goal of this Proposal,[47] we recommend the following changes:

- Revise the proposed assessment methodology of each of the statutory factors to be more specific and binding to increase clarity for banks, regulators, and the public. The current language in the Proposal is too vague to be helpful and does not strengthen the FDIC's merger process. Furthermore, the description of each factor—with specific references to the omission of metrics or benchmarks—actually increases uncertainty and ambiguity. Approving the Proposal in its current form dangerously codifies a vague set of parameters.

- Remove the allowance for the FDIC to ignore its own rules and approve mergers that would create monopolies or erode competition when the merging entities claim that the merger would meet the needs of a community or avoid a probable bank failure. While we certainly support a banking system that promotes access to banking for Main Street America as well as financial stability, this aspect of the Proposal gives far too much discretion to the agency and power to banks with unlimited resources to lobby the FDIC. In these lobbying efforts, banks prioritize their own profits, not the good of society. Therefore, we need a Proposal that establishes and maintains appropriate guard rails.

- Increase cooperation and coordination of merger policies and procedures among the banking agencies, to reduce regulatory arbitrage. In addition to this Proposal, the OCC has a separate and distinct proposal for bank merger guidelines.[48] The Federal Reserve has stated that it is unlikely to update its merger policies at this time.[49] This disjointed and apparently uncoordinated process will likely lead to differences in policies among the banking regulatory agencies and uneven standards for protecting financial stability and consumers from the dangers of consolidation. A set of consistent standards followed by all three banking agencies that properly and fully protect the financial

[46] Sheila Bair & Thomas Hoenig Comment Letter, *Request for Comment on Proposed Statement of Policy on Bank Merger Transactions* (June 7, 2024), https://www.fdic.gov/resources/regulations/federal-register-publications/2024/2024-proposed-policy-on-bank-merger-transactions-3064-za31-c-004.pdf.

[47] Federal Deposit Insurance Corporation, *Statement by Martin J. Gruenberg, Chairman, FDIC, on Proposed Statement of Policy on Bank Merger Transactions* (Mar. 21, 2024), https://www.fdic.gov/news/speeches/2024/spmar2124a.html.

[48] Business Combinations Under the Bank Merger Act, *supra* note 4.

[49] *See* Ebrima Santos Sanneh, *Barr: Liquidity pressure has eased; agencies eyeing unrealized losses, CRE*, AM. BANKER (Apr. 3, 2024), https://www.americanbanker.com/news/barr-liquidity-pressure-has-eased-agencies-eyeing-unrealized-losses-cre.

system and the American people would better serve the country.

- Maintain robust and extensive information collection in merger applications. We recognize that the information collection that would be necessary to conduct the proposed analysis of potential mergers is extensive, but ***this is not a burden for banks***; instead, it is a justified cost of doing business and vital to protect financial stability and consumers. The cost to banks that request merger approval must be weighed relative to the enormous cost of over-concentration, contagion risks, megabank failures, TBTF bailouts, and bank crises. These all have significant financial and human costs that must not be discounted, overlooked, or used as justification to reduce in any way the requirement for banks to provide all necessary information for merger applications.

COMMENTS

I. REVISE THE PROPOSED ASSESSMENT METHODOLOGY OF EACH OF THE STATUTORY FACTORS TO BE MORE SPECIFIC AND BINDING TO INCREASE CLARITY FOR BANKS, REGULATORS, AND THE PUBLIC.

The Proposal outlines the FDIC's considerations throughout the merger application and approval process. There are several critical problems with these that must be remedied before finalizing the Proposal. Most importantly, the Proposal would codify very general and vague guidelines, rather than strengthening the FDIC's merger process. For example,

- **Monopolistic or Anticompetitive Effects:** The Proposal states that anticompetitive effects will be weighed against the convenience and needs of the community but does not provide any metrics or benchmarks to guide this comparison or decision-making process. Presumably the determination for metrics or comparison methodology would be left to the banks, which are highly motivated to convince the FDIC to approve merger applications.

- **Financial Resources and Managerial Resources and Future Prospects:** The Proposal states that the post-merger entity must be financially and managerially ***stronger*** than before the merger but does not specify, for example, how much stronger it must be, whether it must be stronger across a range of metrics or if just a select few metrics are sufficient, or how the merging entities' past record of management examination ratings, legal compliance, or risk management will be considered in the decision.

- **Convenience and Needs of the Community to Be Served:** The Proposal states that the post-merger entity must ***better*** serve the community than it would absent the merger. It provides a long list of possible ways to gauge this well-being, ranging from retail locations to lending limits to products and services to pricing. However, it provides no details on the appropriate metrics or time periods to use to make this comparison.

- **Risk to the Stability of the United States Banking or Financial System:** The Proposal provides a range of factors to use in gauging the financial stability risk of a merger—the size of entities involved, the availability of substitute providers for critical services, the interconnectedness of the resulting entity, the complexity of the resulting entity, and any cross border activities in which the merging entities are involved—but no metrics or limits to guide consistent decision-making on these factors. The Proposal does state that mergers involving Banks above $100 billion in total assets will be subject to added scrutiny but does not give any further details.

- **Effectiveness in Combatting Money Laundering Activities:** The Proposal states that the FDIC will consider merging entities' records related to anti-money laundering and countering the financing of terrorism but does not specify metrics, limits, or time periods that will be considered in this assessment.

Across all of these statutory factors, the Proposal states that the lack of clarity is intentional and meant to provide flexibility to the FDIC in the assessment process. However, in its current form, the lack of clarity actually clouds transparency more than it helps because the guidelines are so vague. Therefore, ***we recommend the statutory factors either be revised to be much more specific or removed from the Proposal entirely***.

II. REMOVE THE ALLOWANCE FOR THE FDIC TO IGNORE ITS OWN RULES AND APPROVE MERGERS THAT WOULD CREATE MONOPOLIES OR ERODE COMPETITION WHEN THE MERGING ENTITIES CLAIM THAT THE MERGER WOULD MEET THE NEEDS OF A COMMUNITY OR AVOID A PROBABLE BANK FAILURE.

While we certainly support a banking system that promotes access to banking for Main Street America as well as financial stability, this aspect of the Proposal gives far too much discretion to the Agency and power to banks with unlimited resources to lobby the FDIC. In these lobbying efforts, banks prioritize their own profits, not the good of society. Therefore, we need a Proposal that establishes and maintains appropriate guard rails.

The experience of spring 2023 provided a real-life example of the dangers of such a loophole. In May 2023, JPMorgan was approved to acquire the failing First Republic Bank. As a result of this transaction, the largest Wall Street megabank was allowed to become even larger and more powerful. This was done ***despite the fact that there were other banks that bid for the failing***

First Republic Bank.[50] While time is certainly of the essence in the case of a failing bank, the financial system and the American public do not benefit from the largest banks simply getting larger. ***Therefore, we recommend that this allowance for discretion be removed from the Proposal.***

III. INCREASE COOPERATION AND COORDINATION OF MERGER POLICIES AND PROCEDURES AMONG THE BANKING AGENCIES, TO REDUCE REGULATORY ARBITRAGE.

In addition to this Proposal, the OCC has a separate and distinct proposal for bank merger guidelines.[51] The Federal Reserve also has separate policies and has stated that it is unlikely to update those policies at this time.[52] This disjointed process leads to differences in policies among the banking regulatory agencies and uneven standards for protecting financial stability and consumers from the dangers of consolidation. The financial system and the American people would be better served by a set of consistent standards that all three banking agencies follow to properly and fully protect the financial system and consumers.

The example discussed earlier with Flagstar's acquisition of New York Community Bank and Signature Bank clearly proves the damage that can result from inconsistent policies and uneven application of those policies. After trying and failing to get FDIC and Fed approval, New York Community Bancorp shopped for a more friendly regulator, the OCC, which resulted in Flagstar's acquisition of New York Community Bank on December 1, 2022. The result of this regulatory arbitrage was that Flagstar ballooned from $25 billion in assets to $90 billion in assets. With the ink barely dry on that merger, the banking regulators—just 100 or so days later—approved Flagstar's acquisition of Signature Bank, causing Flagstar's total assets to jump to $123 billion.[53] It simply should be a surprise to no one that the bank that resulted from these rapid-fire mergers ended up in distress in 2024.

Flagstar's well-publicized managerial and financial problems in 2024 demonstrate the continuing challenge it presents to the banking regulators from a supervisory standpoint, as well as the financial stability challenges that it presents to the financial system as a whole. The American people rely on the banking regulators to protect them and the broader financial system. ***Again, this Proposal, which codifies many vague guidelines, is simply not sufficient in its current form.***

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50 Federal Deposit Insurance Corporation, BID SUMMARY: FIRST REPUBLIC BANK, SAN FRANCISCO, CA, https://www.fdic.gov/resources/resolutions/bank-failures/failed-bank-list/first-republic-bid-summary.html (last visited Apr. 5, 2024).

51 Business Combinations Under the Bank Merger Act, *supra* note 4.

52 *See e.g.*, Ebrima Santos Sanneh, *supra* note 49.

53 *See* Better Markets, *supra* note 29 at 1.

IV. MAINTAIN ROBUST AND EXTENSIVE INFORMATION COLLECTION IN MERGER APPLICATIONS.

Any cost to banks requesting merger approval must be weighed relative to the enormous cost of megabank failures, TBTF bailouts, and bank crises.

The 2008 Crash was the worst financial crisis since 1929, nearly causing a modern-day Great Depression. Unprecedented, massive, and extremely costly government intervention was all that prevented an even more dire outcome. Nevertheless, the costs of the crash, both human and economic were severe. The 2008 Crash and its fallout ultimately cost the hardworking American people more than $20 trillion in lost gross domestic product, historically high unemployment, underemployment, long-term unemployment, foreclosures, homelessness, underwater mortgages, bankrupt businesses large and small, lost savings, deferred or denied retirements, educations cut short, and so much more.[54]

Of course, we don't need to go all the way back to 2008, 16 years ago, to see the grave risks posed by TBTF banks. The 2023 banking crisis was decidedly not as bad as 2008, but it was still costly and may not even be over, as highlighted by the recent trouble at Flagstar Bank after its crisis acquisition of Signature Bank. The Damocles Sword of TBTF banks is ever present and can materialize at any time, making the necessity of robust merger reviews (among other things) an ongoing imperative.

While mergers and the threat of TBTF can seem technical and complex, the significant if not catastrophic human costs must be kept foremost in mind. Financial costs must not be used as justification to reduce in any way the requirement for banks to provide all necessary information for merger applications. Mergers, especially those that involve large and consequential transactions, have grave financial stability and consumer protection implications. They cannot be made hastily or with limited information. The true gravity of the potential consequences should drive and inform all the steps in the process.

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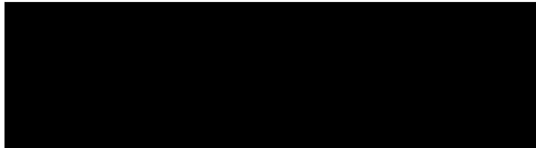
54 *See* BETTER MARKETS, THE COST OF THE CRISIS 3 (July 2015), https://www.bettermarkets.org/sites/default/files/Better%20Markets%20-%20Cost%20of%20the%20Crisis_1.pdf.

CONCLUSION

We hope these comments are helpful as the FDIC works to strengthen its merger guidelines.

Sincerely,



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