American Bankers Association
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Via Electronic Submission

Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Attn: Debra Buie Decker,
Executive Secretary

RE: Request for Comment on Proposed Statements of Policy on Bank Merger Transactions (RIN 3064-ZA31)[1]

The American Bankers Association (ABA)[2] appreciates this opportunity to provide the views of our members to the Federal Deposit Insurance Corporation (FDIC) concerning its proposed statement of policy (Proposal) regarding transactions subject to the Bank Merger Act (BMA).

ABA's members comprise the entire range of the US banking industry and compete vigorously in diverse product and geographic markets to serve their customers. Preserving this diversity and enhancing delivery of financial services to the national economy is a central concern of both our industry and our nation's public policy.

ABA believes that a review of the regulations and guidelines for assessing applications under the BMA (and functionally similar applications under the Bank Holding Company Act of 1956), is critical to the health of the US financial system and economy. Many aspects of these regulatory provisions are now at least 25 years old. In the intervening years, the market for financial products and services has undergone tremendous change, thanks to the rise of availability and

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[1] *See* https://www.fdic.gov/sites/default/files/2024-04/2024-03-21-notice-dis-b-fr.pdf (Mar. 21, 2024), *published at* 89 Fed. Reg. 29222 (April 19, 2024).

[2] The American Bankers Association is the voice of the nation's $24 trillion banking industry, which is composed of small, regional and large banks that together employ approximately 2.1 million people, safeguard $19 trillion in deposits and extend $12.4 trillion in loans.

use of online banking,[3] the interstate expansion of bank branch networks,[4] enhanced market access made possible by advertising and communication innovations, and the increased market presence of nonbank financial firms, including "fintechs."

Because of these significant changes in the financial services market, the current bank merger assessment guidelines of FDIC, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, and the United States Department of Justice (DOJ) fail to take into account significant competition in many product lines, including in many rural markets.

For that reason and others, we write to highlight several aspects of the Proposal. We also note concerns with a number of other aspects of the Proposal:

- *Modernizing the Assessment of Competitive Effects:* The assessment of competitive effects needs to be modernized and broadened to take account of nonbank lenders, as well as online competition from banks lacking a physical presence in local markets.

- *Financial Stability Analysis in Bank Mergers*: FDIC should clearly define the financial stability analysis for bank mergers and avoid reliance on imprecise measures like asset size alone.

- *Convenience and Needs Factor*: The requirement for applicants to demonstrate increased benefits to community convenience and needs compared to the pre-merger situation is subjective and lacks evidence of supporting congressional intent.

- *Public Statements on Application Withdrawals*: FDIC should not issue detailed public statements on merger application withdrawals. Instead, FDIC should continue with its current policy of disclosing only that the application was withdrawn without elaborating on underlying issues.

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[3] According to a 2023 ABA Survey, eight in 10 consumers (81%) used a mobile device to manage their bank account at least once in the previous month, and greater than half (59%) did so more than three times, according to the survey. Nine in 10 adults ages 18-44 have used a mobile device to manage their bank account in the previous month compared to 62% of adults ages 65+. In addition, the survey found that 60% of U.S. adults used a mobile app to make a payment or transfer money within the past year – up from 34% just four years ago – with three-quarters of 18–44-year-olds reporting that they had done so. *See* https://www.aba.com/about-us/press-room/press-releases/consumer-survey-digital-banking-experience-2023).

[4] Interstate branching was liberalized under the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Public Law No: 103-328 (108 Stat. 2338; Date: 9/29/94).

- *Pre-Merger Divestiture Requirements*: Requiring divestitures before finalizing mergers could significantly delay completion of transactions, causing unnecessary uncertainty for customers and employees.

- *Confidentiality of Supporting Materials*: FDIC should confirm that detailed nonpublic information provided in merger applications will remain confidential, as public disclosure of sensitive information could damage banks while mergers are pending and thereafter.

- *Transactions Between IDIs and Non-Insured Entities*: Routine transactions such as transfers of health savings account custodial functions should not be subject to FDIC review under the BMA, and FDIC should facilitate these transactions without formal merger applications, similar to practices by OCC and the Federal Reserve.

- *FDIC should comprehensively review the implications of merger transactions involving banks and credit unions:* FDIC should scrutinize credit union-bank mergers more closely due to their increasing prevalence, potential competitive impacts, and the lack of transparency and regulatory oversight that may disadvantage consumers and communities.

I. The assessment of competitive effects needs to be modernized and broadened to take account of nonbank lenders, as well as online competition from banks lacking a physical presence in local markets.

The proposal states that in reviewing merger applications FDIC will consider "all relevant market participants," which will include "any other financial service providers that FDIC views as competitive with the merging entities, including providers located outside the geographic market when it is evident that such providers materially influence the market."[5] However, the proposal confirms that the traditional measure of deposit concentrations based on the presence of offices in geographic markets, as measured by the Herfindahl-Hirschman Index (HHI), will continue to be an important metric.

Market definitions based primarily on bank branch networks omit consideration of critical features of markets in which banks operate and customer groups which they serve. Any market definition should allow these additional factors to be taken into account in assessing the relevant competitive environment:

- Online delivery of financial services by banks without a branch presence, as well as by online mortgage companies, nonbank commercial real estate lenders, and other online lending services;
- Money-market funds (which are direct competitors for bank deposits);

[5] Proposal at 29240.

- Farm Credit System institutions, thrift institutions, and credit unions; and
- Fintechs and other nonbank firms, which frequently unbundle financial services traditionally provided by banks through physical branches.

Nonbank lenders underwrote 90% of all Federal Housing Administration (FHA) mortgages in 2022.[6] Nonbanks have also considerably increased their market share in the overall mortgage origination space, increasing from just 19% in 2007 to 61% in 2022.[7] Furthermore, nonbank lenders provide the majority of US small business loans.[8] Fintech lenders have accounted for one-third of the total increase in nonbank loans since 2010.[9] However, depositories in 2020 financed approximately $895.4 billion of the almost $1.4 trillion small business lending market.[10]

Finally, while private credit firms are direct competitors of banks in certain areas, they have significantly fewer regulatory requirements and less supervision than banks.[11] Because they are not as regulated as banks, estimating the size of the private credit market is difficult to measure precisely, but recent estimates are as high as $3.14 trillion.[12] The private credit industry recognizes that they compete directly with banks. Some in the industry openly acknowledge that new regulations, such as the Basel III Endgame capital requirements, which may reduce bank lending, would benefit them directly.[13] Regulators must recognize and consider the various nonbank competitors that banks face, especially given the current uneven regulatory landscape. These diverse financial institutions contribute to a highly competitive market environment.

These developments highlight that assessing the competitive impact of a proposed merger on a given market will be materially incomplete and inaccurate if it does not consider competition

[6] *Borrowers Turned to Nonbank Lenders for Mortgages*, BLOOMBERG (Dec. 18, 2023) https://www.bloomberg.com/graphics/2023-nonbank-lender-mortgage-loan-borrower-fee/#:~:text=Today%2C%20the%20biggest%20banks%20rarely,decade%20ago%20it%20was%2028%2C00.

[7] *More than mortgages: Hidden ways banks contribute to housing access,* American Bankers Association (February 9, 2024), available at https://bankingjournal.aba.com/2024/01/more-than-mortgages-hidden-ways-banks-contribute-to-housing-access/.

[8] Federal Deposit Insurance Corp., *The Rise of Finance Companies and FinTech Lenders in Small Business Lending* (2021), https://www.fdic.gov/analysis/cfr/bank-research-conference/annual-20th/papers/gopal-paper.pdf.

[9] *Id*.

[10] Small Business Administration Office of Advocacy, *Small Business Finance FAQ* (2022), https://advocacy.sba.gov/wp-content/uploads/2022/02/FinanceFAQ-Final-Feb2022.pdf.

[11] *Private equity firms step up plans to edge banks out of low-risk lending*, FINANCIAL TIMES, https://www.ft.com/content/afb30b48-29c3-4ae2-aa54-34915d78bdc8.

[12] *Private credit is even larger than you think*, FINANCIAL TIMES, https://www.ft.com/content/bf3f3e70-e849-41db-9a29-f2e5ed988e97.

[13] *Carlyle Sees 'Deluge of Opportunities' in Private Credit From Basel Endgame,* BLOOMBERG (Feb. 29, 2024), https://www.bloomberg.com/news/articles/2024-02-29/carlyle-sees-deluge-of-opportunities-in-private-credit-from-basel-endgame?embedded-checkout=true.

from nonbank lenders and other financial service providers. In some merger applications banks have already used additional data to document such market penetration:

- Data gathered pursuant to the Home Mortgage Disclosure Act (HMDA)[14] and the Community Reinvestment Act (CRA)[15] can be used to show market activity conducted other than through branches, (as considered to some extent already in Federal Reserve geographic market definitions); and
- Evidence from traffic patterns can show customer use of services in wider areas.

FDIC should encourage the inclusion of this and similar relevant information in merger applications when appropriate to provide a more accurate picture of current market conditions.

II. FDIC should clearly articulate what a financial stability analysis in the context of a bank merger would entail and what standards would apply. Detailed standards should be proposed for public review and comment.

The Proposal provides that in evaluating the financial stability factor, FDIC would consider (1) size; (2) substitutability; (3) interconnectedness; (4) complexity; (5) cross-border activity and (6) other elements impacting financial stability.

As part of the complexity criterion, FDIC would consider the cost and operational efficiency with which it could resolve a resulting institution. Due to information gaps between institutions, it is unclear whether banks submitting merger applications would have sufficient information to complete an accurate resolvability analysis, but FDIC should not use imprecise assumptions based on, for example, asset size alone as measures of resolvability. Though failed institutions of different sizes and business models may require different approaches to resolution, FDIC has a variety of tools at its disposal in such situations. These tools offer options to preserve financial stability in a wide variety of failure scenarios.

Moreover, applying such imprecise assumptions in the name of financial stability would likely have adverse implications for fostering competition. The Proposal specifies that transactions resulting in institutions with total assets over $100 billion are more likely to present financial stability concerns and would be subject to heightened scrutiny. Yet such resulting institutions could represent competition for other large banking organizations that have already achieved significant growth, including by growing organically. Adding hurdles to mergers resulting in banks above $100 billion may ultimately weaken competition.

Finally, FDIC should consider the impact of nonbank competition on regulated depository institutions in the context of financial stability. Nonbanks enjoy a competitive advantage because

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[14] Codified at 12 USC § 2801 *et seq.*

[15] Codified at 12 USC §2901 *et seq.*

they are not restrained from creating financial stability risks (as well as being free of many other regulatory burdens). Acknowledging the statutory requirement to consider implications for financial stability of transactions subject to the BMA, FDIC should keep in mind the relatively greater potential impact of nonbank competitors on the financial stability landscape.

III. The convenience and needs factor should not impose an affirmative burden on applicants to demonstrate how the transaction will benefit the public above and beyond the pre-merger status quo.

The Proposal includes an unprecedented requirement that the applicants demonstrate increased benefits to the convenience and needs of their community(ies) compared to the pre-merger situation. It is not clear how an affirmative burden can be measured without being subjective. It is also unclear whether there is a legal basis for requiring a demonstration that there would be a net increase compared to if the merger did not occur. FDIC cites no evidence of Congressional intent to have an affirmative burden placed on banks. Moreover, the Proposal fails to acknowledge that mergers are sometimes the best path for institutions to bear the burden and costs of increasing regulation and compliance and thus maintain banking services in their communities that would otherwise decline or disappear.

FDIC's focus on proposed branch closures fails to consider appropriately the numerous innovations in customer service channels in recent decades. The evolution of banking services delivery noted above as affecting competitive analyses is also highly relevant to banks' options for serving the convenience and needs of their customers and communities in the most cost-effective ways. There are often tradeoffs between benefits such as more in-person service and higher costs that are passed on to customers. Branches may not always be the most cost-effective way of serving customers in a particular market or of delivering certain products. Flexibility in addressing these questions as part of the overall strategic plan of which a merger transaction is a part will permit the parties to optimize delivery of products and services to customers while controlling costs.

When Congress sought to prevent specific types of transactions, such as forming monopolies, it enacted legislation to address them specifically. For example, the Bank Holding Company Act of 1956 (BHCA) was created to limit the growth of bank holding companies and prevent them from becoming monopolies by acquiring other banks. To ensure competition was not reduced, the BHCA required these companies to get approval from the Federal Reserve before acquiring additional banks.

Here, Congress has not mandated that a net increase in benefits to the convenience and needs should be a decisive factor in approving a merger application. If Congress intended for this metric to be determinative, they would have made it explicit. Under 12 USC § 1828(c)(5)(B), banking regulators are directed to "take into consideration… the convenience and needs of the community to be served." This means that, when evaluating a bank merger application, the resulting institution does not necessarily have to prove that convenience and needs will be increased. It is sufficient if the convenience and needs of the community are met, which can include maintaining the current level of service, as the institutions' CRA performance history and proposed future operations following closing of the merger can demonstrate.

Moreover, mergers can sometimes save weaker banks without the need for formal resolution of a failed bank by providing increased capital, enhancing efficiency, and expanding the customer base. Mergers can also help by diversifying risk, bringing in additional management expertise, and boosting market confidence.

IV. FDIC should not issue a public statement when an applicant withdraws its application.

The Proposal states that "if an applicant withdraws their filing, the FDIC Board of Directors may release a statement regarding the concerns with the transaction if such a statement is considered to be in the public interest for purposes of creating transparency for the public and future applicants." FDIC's current policy is to publicly disclose merger application withdrawals. However, they do not currently provide a public statement explaining the reasons behind the withdrawal.

ABA is concerned that this new practice may impose reputational damage on applicants. Public statements on withdrawals would seem to defeat the purpose of allowing an institution to withdraw. In particular, a public statement that suggests supervisory concerns arising from the merger application could damage confidence in one or more of the institutions, and it would be inconsistent with FDIC's overall confidential treatment of supervisory information. Even if a withdrawal occurs for other reasons, e.g., delays in application processing and decisioning that impair the merger's business objectives, cause staff or customer uncertainties at the institutions, etc., the difference in treatment of withdrawals could lead to damaging public speculation and even loss of confidence in the institutions. Changes to the current practice surrounding withdrawals present serious risks that outweigh any benefits to the institutions involved or to the public.

V. Requiring divestiture before the merger transaction will add significant delays to the process.

The Proposal includes an FDIC requirement to complete divestitures prior to finalizing the merger. This condition to divest branches and their associated deposits before completing the merger process could significantly prolong the transaction closure timeline. One potential consequence is prolonging the uncertainty for bank customers and employees that merger transactions generally involve, without any offsetting benefits. This requirement is unnecessary, as instances of post-merger divestiture failures are exceptionally rare. Since FDIC possesses alternative supervisory mechanisms to address any concerns arising from such situations, imposing this additional burden is not justified given the existing regulatory safeguards in place.

VI. Any supporting materials acquired or requested in connection with the merger application should be kept confidential.

The Proposal would require merger applicants to provide more detailed information as part of their applications than FDIC has required in the past. It is important that FDIC confirm that any information provided through the application process will remain confidential. Sensitive information provided to FDIC could be damaging for banks if revealed to the public while the merger is ongoing or afterwards.

VII. Transactions between an insured depository institution (IDI) and a non-insured entity should not require review under the BMA when they are part of a routine sale of an asset or business.

FDIC's interpretation of Section 18(c)(1)(C) is overly broad and would result in the misapplication of the BMA to custodial relationships. The Proposal indicates that Section 18(c)(1)(C) of the BMA applies to the transfer of a custodial relationship to a nonbank if the transaction also involves a transfer of deposits to the nonbank or another entity. More specifically, the preamble states that:

> Although parties seeking to engage in transferring customer accounts that consist of both custodial and deposit relationships may characterize the transaction solely as a transfer of custodial relationships, such transactions implicate the BMA if they also result in a transfer of the deposit relationship. It has therefore been the view of the FDIC that the BMA is implicated if an IDI transfers deposit relationships concurrent with, or subsequent to, a transfer of the custodial relationship. Accordingly, where customers have both a custodial and depository relationship with an IDI, an IDI may not evade the BMA by transferring custodial rights to a third party that, in its newly acquired custodial capacity, causes the customer's depository relationship to be transferred either to itself or to another entity. This is true even if such transfer was ostensibly at the direction of a noninsured entity pursuant to custodial rights acquired from the IDI.[16]

This interpretation of Section 18(c)(1)(C) of the BMA is overly broad and results in the misapplication of the BMA to transactions in which a custodial relationship is purchased for cash rather than the assumption of the deposits associated with the custodial relationship. Section 18(c)(1)(C) provides that without the prior approval of FDIC "no insured depository institution shall transfer assets to any noninsured bank or institution in consideration of the assumption of

[16] Proposal at 29226.

liabilities for any portion of the deposits made in such insured depository institution."[17] Thus, by its very terms, the BMA applies only to transactions in which an asset is acquired in exchange for the assumption of deposits. Yet, that is not how many transactions involving custodial relationships are structured. In the transfer of a custodial relationship, the right to act as the custodian of the custodial account (i.e., the "asset") is acquired for cash (i.e., the "consideration") and may not include the assumption of deposits by the acquiror.[18]

An example of such a transaction is the transfer of a custodial right in connection with the transfer of the custody of health savings accounts ("HSAs")[19] from a bank to a nonbank trustee. In such a transaction, the nonbank trustee will pay the bank a sum of money for the assumption of the right to act as custodian of the HSAs. The nonbank does not assume the deposits; it only acquires the right to be the custodian of the HSAs. After such right is acquired, each owner of an HSA has the right to object to the transfer of funds to the nonbank trustee or to direct that the funds be placed in one of the nonbank trustee's cash deployment options, including for example, a bank deposit option, a nonbank annuity option, or nonbank investment option.

The BMA was never intended to reach situations in which an individual owner of a deposit account decides to transfer his or her deposits to another institution. Moreover, the application of the BMA in connection with the transfer of trustee or custodial services imposes a burden on account holders if a bank decides to cease offering such services. By requiring the application of the BMA to the transfer of the trustee or custodial role, FDIC effectively eliminates the ability of many banks, especially community banks, to help account holders with a transfer of the trustee role without incurring excessive costs. As a result, account holders are left on their own to find a new trustee when the bank exits the line of business.

Prior rulings by FDIC and other federal banking agencies support the conclusion that the BMA does not apply to transactions in which a bank or nonbank assumes a relationship, such as a trustee or custodian, but does not assume deposit liabilities in exchange for such relationship.

A 2019 letter issued on an interagency basis by FDIC, the Federal Reserve Board and the Office of the Comptroller of the Currency confirms that a deposit account associated with a trust account and the trust account are separate relationships between a customer and a bank.[20] As

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[17] 12 U.S.C. 1828(c)(1)(C).

[18] The term "consideration" is not defined in the BMA. However, when a term is not defined in a statute, it is given its ordinary meaning (see *Smith v. United States*, 508 U.S. 223, 228). Black's Law Dictionary (Revised Fourth Edition, 1968) defines "consideration" as the "inducement to a contract; the cause, motive, price or impelling influence which induces a contracting party to enter into a contract."

[19] An HSA is a trust created by section 223(d) of the Internal Revenue Code that has been established for the purpose of paying the qualified medical expenses of the account beneficiary. Section 223(d)(1)(B) of the Internal Revenue Code provides that an HSA custodian may be a bank or a nonbank that demonstrates to the satisfaction of the Secretary of the Treasury that such person will administer the trust in a manner that is consistent with the requirements of the Code. An HSA trustee also must comply with Treasury regulations ensuring compliance with applicable standards to protect HSA holders. These standards mandate that the parties have a bona fide trust or custodial relationship, under which the trustee or custodian is obligated to follow the HSA holder's lawful instructions and Treasury requirements for HSAs.

[20] OCC Interpretive Letter #1164, April 2019. That letter reversed a 1990 unpublished OCC letter that held that the BMA did not apply to the transfer of accumulation accounts related to a corporate trust business. In that case,

such, a trustee or custodial relationship may be transferred separately from the transfer of the associated deposit account without triggering the BMA. A 1996 letter by FDIC Deputy General Counsel Doug Jones is illustrative of such a transaction.[21] That letter determined that the BMA did not apply to a bank's acquisition of the bond fiduciary services business conducted by an uninsured, limited purpose trust company because the bank did not acquire the uninvested cash generated by the bond transactions of the trust company, which was held in an account at another bank. These letters indicate that a fiduciary or custodial relationship may be transferred without triggering the BMA.

More importantly, a 1987 OCC Interpretive Letter indicates that the BMA is not applicable when the deposits associated with a trust account are transferred by a trustee or custodian after the transfer of the trust account. That letter addressed the sale of an "institutional trust service business" or "ITB" to a national bank.[22] OCC determined that the acquiring bank was not assuming deposit liabilities because the deposits would remain in the selling bank until they matured, after which time the acquiring bank would be able, as trustee, to have the deposits placed at another institution. As explained in the letter:

> Some of the assets in the trust accounts to be conveyed to the Buyer in connection with the ITB transaction may be invested in various commercial accounts or other Bank instruments, such as certificates of deposit. These investments could represent deposit liabilities of the Bank. *See* 12 U.S.C. § 1813(1). You have indicated, however, that the Buyer would not assume these liabilities. At the time of the transaction, the trust accounts would be conveyed from the selling fiduciary, the Bank, to the purchasing fiduciary, the Buyer. The assets in the trust accounts which had been invested in the Bank's obligations prior to the transaction would remain invested in those obligations after the transfer of the accounts until those obligations matured in accordance with their terms. There would, therefore, be no assumption of deposit liabilities by the Buyer. The liabilities would remain with the Bank, although the accounts would be administered by a different fiduciary. After the maturation of these Bank obligations, the Buyer would not be contractually obligated to the Bank under the proposed transaction to invest the trust assets in the Buyer's own obligations. Instead, the Buyer, in its capacity as trustee for the trust accounts, would be free to invest the trust assets in any permissible investment consistent with its fiduciary responsibilities under applicable law and in accordance with the governing trust instrument. As a result, there would be no assumption of deposit liabilities within the meaning of section (c)(2) of the BMA.

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however, it appears that the assumption of the accumulation accounts was part of the consideration paid for the acquisition of the corporate trust business.

[21] FDIC 96-5.

[22] OCC Letter from Emory W. Rushton (December 22, 1987), 1987 WL 149889.

This 1987 OCC letter supports the proposition that a nonbank custodian is not assuming insured deposits, and that as custodian it may move matured deposits from the selling bank to another depository institution at the direction of the account holder. To the extent that the trust funds are held in demand deposits, this could be done immediately after the transfer of the custodial right.

In summary, the BMA does not apply to the transfer of custodial rights for administering HSAs from a bank to a nonbank custodian when the nonbank custodian does not assume any deposit liabilities, and the assumption of deposit liabilities by a third-party bank is not the consideration for the sale of the custodial rights. The consideration for the transaction is a cash payment by the nonbank trustee for the right to serve as the custodian of the HSAs. Prior rulings by FDIC and other federal banking agencies support this conclusion, and there is no other policy reason for applying the BMA in such cases.

VIII. FDIC should comprehensively review the implications of merger transactions involving banks and credit unions.

According to FDIC, 121 bank merger applications involving credit unions were approved between 2004 and 2023.[23] Although merger applications may involve entities not insured by FDIC, regulators in several states—Colorado, Minnesota, Nebraska, and Tennessee—have rejected bank mergers with credit unions. Regulators in Iowa and South Carolina have indicated they would respond similarly if such applications were filed in those states.[24] In addition, both Mississippi and Tennessee have enacted laws effectively barring such transactions.

Credit union bank acquisitions represented 27.3% of announced mergers this year, the highest percentage to date.[25] As credit unions acquire banks in more states and the average assets of targeted banks continue to grow, FDIC should examine the competitive effects of such mergers. FDIC should also study their impact on consumers and the communities in which the entities operate.

As not-for-profit cooperatives owned and operated by their members, credit unions have a statutory mission to provide basic consumer financial services to those of "modest means." The Federal Credit Union Act (FCU Act) was enacted 90 years ago enabling small groups of individuals connected through common bonds in local communities to pool their resources and support one another financially. Given their mission and structure, these financial institutions are exempt from most taxes and the Community Reinvestment Act (CRA).

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[23] Request for Comment on Proposed Statement of Policy on Bank Merger Transactions, 89 Fed. Reg. 24312, 24330 (Apr. 19, 2024) (Appendix A, Table 3), https://www.federalregister.gov/documents/2024/04/19/2024-08020/request-for-comment-on-proposed-statement-of-policy-on-bank-merger-transactions.

[24] Following the Iowa Division of Banking's approval of a credit union bank acquisition in March 2020, it proclaimed it would deny future applications as such transactions are not authorized under Iowa Code § 524.1309.

[25] S&P Global Market Intelligence, *Credit Union-Bank Deals Becoming Bigger Part of M&A Landscape*, S&P GLOBAL (May 28, 2024), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/credit-union-bank-deals-becoming-bigger-part-of-m-a-landscape-80842307.

Despite certain limitations promulgated by the FCU Act regarding membership, business lending, and capital market activities, among others, legislative and regulatory changes have helped credit unions circumvent those restrictions. Together with the tax and CRA exemptions, these policy modifications have facilitated growth within the industry; credit unions now have $2.2 trillion in assets with 140 million members systemwide.[26]

Bank acquisitions clearly demonstrate how credit union activities have expanded far beyond congressional intent. Rather than serving their existing members, "a credit union's purchase of a bank is typically a strategic action to expand its geographic footprint or to grow a loan program,"[27] as stated by the National Credit Union Administration (NCUA).

Likewise, the Federal Reserve's Community Depository Institutions Advisory Council (CDIAC) noted that this development has allowed credit unions to "venture into [the] commercial lending space beyond their traditional consumer customer base."[28] The CDIAC also found that the credit union tax status emboldens "them to engage in deals that might seem economically unviable for other financial institutions."[29] Their ability to offer cash through their retained earnings gives them a "distinct advantage" making them "desirable candidates for such deals."[30]

Although NCUA has conveyed to Congress its intent to achieve uniformity with other regulators as it relates to supervision, "former bank customers that are now credit union members may have less consumer financial protection oversight after the bank-to-credit union transaction."[31] Additionally, the elimination of CRA and tax obligations could hamper investments in jurisdictions where these transactions take place.

While there is a widely accepted presumption that credit unions always act in the best interest of their members as they are owned by them, NCUA Chairman Todd Harper recently remarked, "The people who manage the credit union, their interest doesn't always align with that of the members."[32] Indeed, credit union executives might stand to personally benefit from these

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[26] National Credit Union Administration, *Quarterly Data Summary Report Q4 2023*, NCUA (2023), https://ncua.gov/files/publications/analysis/quarterly-data-summary-2023-Q4.pdf.

[27] National Credit Union Administration, *NCUA Response to Congressman French Hill's Questions on Credit Union-Bank Transactions*, NCUA (2024), https://ncua.gov/foia/library/ncua-response-congressman-french-hill-questions-credit-union-bank-transactions.

[28] Federal Reserve Board, *Community Depository Institutions Advisory Council Meeting*, Federal Reserve (Nov. 16, 2023), https://www.federalreserve.gov/aboutthefed/files/CDIAC-meeting-20231116.pdf.

[29] *Id.*

[30] *Id*.

[31] National Credit Union Administration, *supra* note 27.

[32] Brookings Institution, *A Conversation with National Credit Union Administration Chairman Todd Harper*, BROOKINGS (May 25, 2023), https://www.brookings.edu/events/a-conversation-with-national-credit-union-administration-chairman-todd-harper/.

transactions in terms of their compensation; however, that remains largely unknown given the general lack of transparency around credit union bank acquisitions.[33]

As FDIC considers revisions to its Statement of Policy on Bank Merger Transactions, credit union mergers with banks warrant greater attention as they increasingly affect the bank merger landscape and do not require member votes of approval when the credit union is the surviving entity.[34] In the interim, FDIC should scrutinize bank merger applications involving credit unions to the highest extent possible. Without further analysis, the benefits these transactions provide bank customers, credit union members, and the communities in which they operate remain yet to be determined. FDIC should investigate these issues and publish a report on its findings.

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Thank you very much for your attention to these matters. Should you have any questions, please do not hesitate to contact the undersigned at hbenton@aba.com or Ashtyn Landen at alanden@aba.com.

Very truly yours,

/s/

Hu A. Benton

Senior Vice President and Policy Counsel

[33] Frank Diekmann, *Why NCUA Should Require CUs to Disclose What They're Paying for Banks*, CU TODAY (May 30, 2023), https://www.cutoday.info/site/From-Frank/Why-NCUA-Should-Require-CUs-to-Disclose-What-They-re-Paying-for-Banks.

[34] 12 C.F.R. § 708a.306(c).