COMPETITIVE ENTERPRISE INSTITUTE

June 18, 2024

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)

To Whom It May Concern:

On behalf of the Competitive Enterprise Institute (CEI), I respectfully submit the following comments in response to the Federal Deposit Insurance Corporation's (FDIC) Proposed Statement of Policy on Bank Merger Transactions.[1] For the various reasons laid out in this comment letter, CEI urges the FDIC to withdraw this destructive policy statement governing mergers and acquisitions of U.S. banks.

CEI is a Washington-based free-market public policy organization, founded in 1984, that studies the effects of regulations on job growth and economic well-being. CEI also pursues public-interest litigation on behalf of consumers and small businesses to ensure that federal agencies follow the requirements of the underlying laws and, when applicable, the Administrative Procedure Act, and to ensure that agencies act within the constraints of the U.S. Constitution. Our mission is to advance the freedom to prosper for American consumers, entrepreneurs, and investors striving for a better life for themselves and their families.

These comments are thus submitted with a great deal of concern about the effects of the proposed rule that will reduce consumer welfare and likely harm the safety and soundness of many banks as well. CEI has long supported competition, with an emphasis on consumer choice and consumer welfare, and has highlighted government regulatory barriers that have inhibited competition.

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[1] 89 Fed. Reg. 29,222 (Apr. 18, 2024). I would like to acknowledge the invaluable assistance in preparing these comments of CEI Research Associate Ari Patinkin and CEI Attorney David S. McFadden

Regarding the banking sector, I have authored a paper[2] and testified before House Financial Services Committee[3] on the FDIC's regulatory barriers to new, or de novo, banks, and the problems posed to both competitiveness and financial stability by the lack of new banking entrants in comparison to recent decades. We have also highlighted government mandates, such as the Sarbanes-Oxley Act, that have been shown to put in place barriers to firms' internal growth and thus distort the market in favor of mergers and acquisitions.[4]

Yet we do not regard mergers and acquisitions, or M&A as the process is often called, as per se problematic or anticompetitive. M&A are in fact, in many cases, a healthy part of capitalism's competitive process that brings innovation and dynamism to industries and the benefits of greater choices and lower prices to consumers. As I have written recently: "A 'new juggernaut' is often exactly what's needed to bring lower prices and other benefits to consumers and entrepreneurs. While small start-ups create many innovations, it is the process of smaller players becoming larger — both through organic growth and mergers and acquisitions — that is often necessary to bring meaningful competition to the biggest players." As an example, I cited Southwest Airlines' feat in bringing airfare prices down after acquiring rival airlines, noting that it trounced once-dominant airlines such as Pan Am and Eastern that have now "gone by the wayside."[5]

Yet it is precisely this type of meaningful competition that the FDIC's policy statement would discourage in the banking sector. As former FDIC Chair Sheila Bair and former FDIC Vice Chair Thomas Hoenig observe in their comments, the policy statement "will have a chilling impact on positive M&A banking activity, including among regional banks where consolidation could strengthen their ability to compete with the mega banks." They note that "the unintended consequence … could be to reduce, not promote, competition in the banking industry."[6]

Bair and Hoenig then note, "rather than improve and clarify its review process" for bank mergers, the policy statement "creates confusion and uncertainty to the process." Among the severe flaws of the policy statement, they highlight its failures "to propose minimum standards as to when the effects of a merger … would raise significant competitive issues," "to propose minimum standards for when a … merger would increase the risk to financial stability sufficient to raise questions of its viability," and "to recognize the impact of competition from nonbank financial institutions." The result of these failures, they conclude, is to "leave the outcome of a proposed merger unclear and

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[2] John Berlau, "A Bird in the Hand and No Banks in the Bush," *Issue Analysis* No. 3, Competitive Enterprise Institute, July 2015, https://www.cei.org/wp-content/uploads/2015/07/John-Berlau-Why-Competition-Offers-a-Solution-to-Too-Big-to-Fail_0.pdf

[3] Testimony of John Berlau before the House Financial Services Committee, Subcommittee on Financial Institutions and Monetary Policy, Hearing on "Revamping and Revitalizing Banking in the 21st Century," February 8, 2023, https://cei.org/wp-content/uploads/2023/02/John-Berlau-tesimony-2-08-23.pdf

[4] John Berlau, "The 20-Year Experiment Holding America Back," *Wall Street Journal*, July 18, 2022, https://www.wsj.com/articles/the-20-year-experiment-holding-the-u-s-back-sarbanes-oxley-corporate-reform-bush-entrepreneurs-investors-fraud-business-11659044813

[5] John Berlau, "Critics of Capital One–Discover Merger Are Missing the Elephants," *National Review*, March 19, 2024, https://www.nationalreview.com/2024/03/critics-of-capital-one-discover-merger-are-missing-the-elephants/

[6] Comment letter of Sheila Bair and Thomas Hoenig, 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

primarily at the discretion of the FDIC and in doing so, makes the process increasingly arbitrary and uncertain."[7]

Bair and Hoenig also note that this rule will discourage mergers that are essential to maintaining the banking system's safety and soundness. They write:

> Encouraging bank M&A has been an important, and essential tool, used by the FDIC and other bank regulators in stabilizing the banking system and reducing the number of bank failures. Acquisitions by strong banks of weaker ones can prevent failures, while protecting communities from the disruption of banking services that inevitably comes with the liquidation of a failed bank.[8]

And by reducing bank failures, they as well as others note, the costs to the FDIC's deposit insurance fund is also reduced, potentially decreasing the overall costs of bank failures to U.S. taxpayers.

Conclusion: withdraw the policy statement

For all the aforementioned reasons, the policy statement should be withdrawn, and it should also be scrapped due to the fact that it was promulgated during a particularly troubling time in the FDIC's history. The rule-making provisions of the Administrative Procedure Act "were designed to assure fairness and mature consideration of rules of general application." NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969). During the tenure of the current chairman, the workplace environment at the FDIC has not been conducive to a mature consideration of proposed rulemaking,[9] as this flawed proposal reflects. It should be withdrawn and reconsidered when there is a more favorable environment for reasoned analysis of public policy.

Thank you for this opportunity to present our views. If you have any questions, please feel free to contact me at John.Berlau@cei.org.

Sincerely,

John Berlau

Senior Fellow & Director of Finance Policy

Competitive Enterprise Institute

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[7] Ibid

[8] Ibid.

[9] See Lauren Irwin, "Revelations from the FDIC report on sexual harassment, toxic workplace," *The Hill*, May 7, 2024, https://thehill.com/business/banking-financial-institutions/4649951-revelations-from-the-fdic-report-on-sexual-harassment-toxic-workplace/; Cleary Gottlieb Steen & Hamilton LLP, "Report for the Special Review Committee for the Board of Directors of the Federal Deposit Insurance Corporation," April 2024, p. 6, https://www.fdic.gov/sites/default/files/2024-05/cleary-report-to-fdic-src.pdf