U.S. Chamber of Commerce

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May 31, 2022

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 Rules, Regulations, Guidance, and Statement of Policy on Bank Merger Transactions (RIN 3064–ZA31)

Dear Mr. Sheesley:

The U.S. Chamber of Commerce ("the Chamber") appreciates the opportunity to respond to the Federal Deposit Insurance Corporation ("FDIC") solicitation of public comments on rules, regulations, guidance, and policy on bank merger transactions.

The Chamber agrees that the FDIC should review the existing regulatory framework in light of the significant changes in the last quarter century to current economic realities and to our empirical understanding of the market, including the following: the explosive growth in competition from online banks, credit unions, and other finance options for consumers; studies indicating that concentration has declined in finance markets and that, in any case, concentration does not reduce competition, particularly given the relative ease of entry into credit markets and the ready availability of competition from creditors outside of particular geographic markets; studies finding that mergers can increase competition; and studies that call into question the use of deposits as a metric for calculating the Herfindahl-Hirschman Index (HHI).

Rather than revise the merger guidelines to subject more proposed transactions to deeper scrutiny, the FDIC could best increase competition in credit markets by using its competition advocacy tools to support tailored and balanced policies that would allow more companies to compete.

Current Financial Markets are Very Competitive

In the last quarter century, competition has increased substantially in credit markets. A recent study of the banking sector from 1984 to 2016 found that bank output

was "supercompetitive" and that fees have declined during this time.[1] According to another paper, the consumer credit market "has seen new entrants, innovative products, aggregate growth, reinvention of incumbents, and decline or departure of companies that could not keep pace with the others. These are the hallmarks of competitive markets."[2]

Consumer choices have increased substantially. Bank branches and ATMs have risen by tens of thousands, brought banking to underserved communities, and moved banks closer to consumers in larger markets. Similarly, in the past two decades, membership in credit unions has risen by about 50 million, to 120 million members, in 2019. Credit unions compete very vigorously with banks on interest rates for loans and credit cards.[3] Online banks, and the expanded geographic reach of brick-and-mortar banks with an online presence, also have significantly expanded competition in credit markets, particularly in light of the disruptions caused by COVID-19. Finally, consumers have still other choices to find credit, including certain retailers, auto lenders, and other non-depository lenders.

The Banking Sector Has Become Less Concentrated Over the Last Two Decades

Contrary to the assumptions set forth in the FDIC's Request for Comment, the U.S. economy is not becoming more concentrated. In an exhaustive analysis of all available census data from the past two decades – data that was unavailable for most prior studies – Dr. Robert Kulick finds that many aspects of the banking and finance sectors have become *less* concentrated since 2002:

> three of the primary six-digit NAICS industries related to Consumer Banking and Credit – Commercial Banking, Credit Card Issuing, and Consumer Lending –have experienced declining concentration since reaching a peak in 2007 and remained less concentrated in 2017 than they were in 2002. The decline in concentration was particularly significant for the Credit Card Issuing industry where [the

[1] Slade Mendenhall, Commercial Bank Competition, Riegle-Neal, and Dodd-Frank, SSRN (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2967998.

[2] See https://files.consumerfinance.gov/f/documents/cfpb_taskforce-federal-consumer-financial-law_report-volume-1_2022-01_amended.pdf ("consumer finance paper"). This paper was originally issued through the Bureau of Consumer Financial Protection's Taskforce on Federal Consumer Financial Law Report. Following an internal review, however, the CFPB concluded that the Taskforce failed to operate in compliance with the Federal Advisory Committee Act, and that the final report therefore should not be relied upon "as a product of a federal advisory committee that was established or operated in compliance with FACA." See https://www.consumerfinance.gov/rules-policy/advisory-committees/taskforce-federal-consumer-financial-law/. Nevertheless, the paper's underlying analysis retains its persuasive value.

[3] See consumer finance paper.

applicable metric] declined by 19.6 percentage points from 75.8 percent in 2002 to 56.2 percent in 2017.[4]

Competition has increased across the economy as companies both large and small have used online tools to become more efficient and expand their reach across the country.

Bank Concentration Does Not Suggest a Lack of Competition in Credit Markets

Furthermore, in part because of this explosion in competition, numerous studies have found that bank concentration does not impair competition. For instance, Houston, Texas has an HHI near 2,300, but also has 92 commercial banks, while Columbus, Ohio has an HHI level around 2,100, but has 48 banks and nine thrifts. In any event, concentration, "although rising, remains below 2,000 for banks and thrifts in most markets."[5]

Moreover, current HHI calculations do not accurately measure the amount of competition in a marketplace. HHIs are based on total deposits, which are "at best loosely correlated with the various financial services that banks and thrifts provide. Because banks can readily reallocate funds from one purpose to another—for example, from business finance to consumer credit or from mortgages to auto loans—their ability to compete for consumers is not tied tightly to their total assets." It is also important to note that, unlike other jurisdictions around the world, U.S. banks are subject to concentration limits. Placing less emphasis on HHIs may result in the imposition of fewer branch divestiture requirements in connection with bank mergers and thus less inconvenience, confusion, and disruption for customers.

Setting aside HHI scores, the ease of entry into credit markets helps to protect and promote competition. As one paper explains, "In sectors where competitors can increase capacity quickly, as is the case in consumer credit, concentration exaggerates the significance of large firms and underestimates the importance of small firms. Dominant lenders cannot raise rates and count on small competitors to empty their inventory of loans." The paper concluded that ease of entry "remains essentially free of intrinsic impediments in credit markets. The number of suppliers available to serve consumers' demand for credit, across a variety of credit products and services, far exceeds levels considered adequate for robust competition. There appears to be no intrinsic barrier to competition in lending."

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[4] Robert Kulick and Andrew Card, Industrial Concentration in the United States: 2002-2017 (March 2022) ("Kulick study"), at https://www.uschamber.com/finance/antitrust/industrial-concentration-inthe-united-states-2002-2017.

[5] See consumer finance paper at 366-67, *supra* note 2.

Indeed, in many instances mergers can increase competition and financial stability.[6] After a merger, the combined institution can have a stronger and broader capital base and liquidity position, more financial resources to improve customer products, and more resources to invest, particularly in lower-income communities. Larger institutions have more resources to protect consumer data and to defend against cyberattacks. For example, many banks merged after Congress lifted laws that prevented banks from operating across state lines (a salutary trend that explains, in part, the rise in bank concentration). These banks are now able to compete more broadly and effectively in more of the country – an improvement for consumers. Likewise, regional bank mergers allow smaller banks to compete with the largest global-systematically important banks (G-SIBs), such that these types of mergers can increase the number of viable competitors in a market and reduce financial stability risks. Such mergers can allow banks to compete more effectively with the many other institutions that offer credit, thereby helping to preserve multiple options for credit seekers.

Finally, mergers also allow banks to make the technology investments to provide their customers with the digital and other services that they want and expect.[7] Across the spectrum of financial services, companies are introducing new products, including online markets for mortgages, certificates of deposit, and commercial loans. Digitization has increased the benefits of scale, but also requires major investments in fixed capital and ongoing investments in digital security.

Many scholars and practitioners agree that bank mergers can benefit consumers. During the administration of President Clinton, the Department of Justice Antitrust Division recognized that bank mergers can improve efficiency which, in turn, can lead to lower costs and better products for consumers:

> The great majority of bank mergers do not cause antitrust concerns, and the Antitrust Division is quite cognizant of that fact. We have on staff some fifty highly-trained economists. As a result, we are familiar with the types of efficiencies that may be produced by bank mergers. To the extent that a bank merger allows the merging firms to achieve significant economies of scale or scope, consumers may benefit from lower costs and/or improved services, and our competitive analysis takes into account such factors.[8]

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[6] See id.

[7] 80% of millennials use digital banking to check their account balances, 76% use digital banking to check their account for fraudulent charges, and 65% use digital channels to make external transfers. *Millennial Banking Insight and Opportunities* (2014) https://www.slideshare.net/FICO/millennial-banking-insights-opportunites

[8] Anne K. Bingaman, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Antitrust and Banking* (Nov. 16, 1995).

Likewise, numerous studies have concluded that bank mergers have pro-competitive effects.[9]

The Financial Stability Factor in Bank Mergers

The current FDIC proposal specifically asks whether the Total Loss-Absorbing Capacity (TLAC) requirement "would facilitate the resolution of a large insured depository institution without resorting to a merger with another large institution or a purchase and assumption transaction with another large institutions?"[10] It is important to keep in mind that the Dodd-Frank Act amended the Bank Merger Act to require regulators to consider the risks to the stability of the U.S. banking or financial system when evaluating a bank merger[11] (although, as the proposal notes, the FDIC policy manual does not address the Dodd-Frank financial stability amendments to the Bank Merger Act). In a recent speech on financial stability concerns, Acting Comptroller of the Currency Michael Hsu—an FDIC Board member—spoke on the resolvability of larger regional banks and recommended that these institutions be subjected to some of the same standards as G-SIBs, including the TLAC requirement, which requires the largest banks to hold a minimum amount of capital and long-term debt at the holding company level to avoid government bailouts of banks.[12]

While the purpose of the TLAC requirement for G-SIBs is help manage systemic risk, applying TLAC to larger regional banks in the U.S. would be stricter than current Financial Stability Board (FSB) standards and could have a detrimental effect on competition:

> a mandate to issue significant long-term debt may be expensive for regional banks, which generally rely on deposits for funding. It is also hard to see how the imposition of a long-

[9] *E.g.*, Hughes, Joseph P., Mester, Loretta J., and Choon-Geol Moon. 2001. "Are scale economies in banking elusive or illusive? Evidence obtained by incorporating capital structure and risk-taking into models of bank production," *Journal of Banking and Finance* 25, 2169-2208; Hughes, Joseph P., and Loretta J. Mester. 2013. "Who said large banks don't experience scale economies? Evidence from a risk-return-driven cost function," *Journal of Financial Intermediation* 22, 559-585; Wheelock, David C., and Paul W. Wilson. 2012. "Do large banks have lower costs? New estimates of returns to scale for U.S. banks," *Journal of Money, Credit and Banking* 44, 171-199; Feng, Guohua and Apostolos Serletis. 2010. "Efficiency, technical change, and returns to scale in large US banks: Panel data evidence from an output distance function satisfying theoretical regularity," *Journal of Banking & Finance* 34, 127-138; Papadimitri, Panagiota, Staikouras, Panagiotis, Travlos, Nickolaos G., and Chris Tsoumas. 2009. "Punished banks' acquisitions: Evidence from the U.S. banking industry," *Journal of Corporate Finance* 58, 744-764.

[10] 87 Fed. Reg. 18,744

[11] 12 U.S.C. § 1828(c)(5)

[12] Michael Hsu, Acting Comptroller of the Currency, "Financial Stability and Large Bank Resolvability," found at https://occ.gov/news-issuances/speeches/2022/pub-speech-2022-33.pdf

> term debt requirement would address Acting Comptroller Hsu's antitrust concerns. Rather, by increasing the costs of operating a regional bank, such a requirement could actually reduce competition in the banking industry.[13]

Regional bank mergers could actually have the effect of providing more stability to the financial system by creating more competition for the largest banks:

> any complete financial stability analysis for purposes of a merger needs to take account of an additional factor: whether the increased size or other changes to a firm post-merger makes it a better substitute for an existing GSIB – that is, whether its presence in those markets – and there may be other markets – reduces the systemic risk presented by other firms. Given that the stated purpose of many regional and mid-size bank mergers is exactly to allow them to better compete with the largest banks, this factor seems significant. If a merger were to create an additional bank capable of providing such services, the systemic consequences of the failure of those other institutions would decline.[14]

To Further Increase Competition, the FDIC Should Advocate for Tailored and Balanced Policies

Rather than revise the merger guidelines to subject more proposed transactions to deeper scrutiny, the FDIC could best increase competition in financial markets by using its competition advocacy tools to support tailored and balanced policies that would allow more companies to compete. Research indicates that bank consolidation increased after legislative and regulatory changes increased the cost of operations.[15] For instance, the Dodd-Frank Act raised compliance costs across the board, but smaller banks bore the burden disproportionately.[16]

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[13] "Shifting Sands: New Prudential Standards for Larger Regional Banks Under Consideration by US OCC," found at https://www.mayerbrown.com/en/perspectives-events/publications/2022/04/shifting-sands-new-prudential-standards-for-larger-regional-banks-under-consideration-by-us-occ

[14] "Financial Stability Considerations for Bank Merger Analysis," found at https://bpi.com/wp-content/uploads/2022/05/Financial-Stability-Considerations-for-Bank-Merger-Analysis.pdf

[15] Marshall Lux, The State and Fate of Community Banking February 9, 2015, M-RCBG ASSOCIATE WORKING PAPER SERIES, No. 37 (2015), at https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/Final_State_and_Fate_Lux_Greene.pdf.

[16] See consumer finance paper at 370-71 (discussing studies), supra note 2.

Moreover, government policies, rather than industry consolidation, typically create the largest barriers to competition: “The most effective and durable barriers are those that become ossified in the amber of laws and regulations. In the case of credit, those barriers can take the form of enforceable interest-rate caps, licensing restrictions, territorial and product limitations, suppression of information, and outright prohibitions of competition.”[17] By working to lower these barriers, the FDIC could enhance competition and better protect consumers.

Antitrust laws should have near universal application, not be tailored to specific sectors or companies. The Chamber is opposed to merger control efforts that deviate from an evidence-based assessment of potential anticompetitive harm. We also oppose applying different competition standards to certain sectors or companies. As the Chamber has already publicly stated, we believe that moving away from a near universal application of the antitrust laws risks diluting the expectation that all economic actors must compete and that the rules of competition apply to all equally.[18]

Conclusion

The Chamber agrees FDIC should revise the Guidelines to reflect current economic realities and to the empirical understanding of the market, particularly the growth of competition in credit markets and the benefits of mergers to consumers. Importantly, the Chamber encourages the FDIC to provide notice and public comment of any updates to the 1995 Bank Merger Competitive Review Guidelines. Thank you for the opportunity to share our views.

Sincerely,

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[17] See id.
[18] U.S. Chamber of Commerce, “Unlocking Antitrust: 3 Reasons Why Simplicity is Antitrust’s Greatest Strength,” found at https://www.uschamber.com/series/above-the-fold/unlocking-antitrust-3-reasons-why-simplicityantitrust-s-greatest-strength.