August 11, 2022

Chair Jerome H. Powell, Vice Chair Lael Brainard,
Vice Chair for Supervision Michael S. Barr, Governor Michelle W. Bowman,
Governor Lisa D. Cook, Governor Phillip N. Jefferson, Governor Christopher J. Waller
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Acting Comptroller Michael J. Hsu
Office of the Comptroller of the Currency
400 7th Street SW
Washington, DC 20219

Re: TD Group US Holdings' Pending Application to Acquire First Horizon Corporation: Addressing the Ongoing Too-Big-To-Fail Problem

Ladies and Gentlemen:

Better Markets[1] appreciates the opportunity to comment on the pending application of the Toronto-Dominion Bank, Toronto, Ontario, Canada, and its subsidiary bank holding companies, TD Group US Holdings, LLC, Wilmington, Delaware, and TD Bank US Holding Company, Cherry Hill, New Jersey (collectively, "TD Bank") to acquire First Horizon Corporation, and thereby indirectly acquire First Horizon Bank, both of Memphis, Tennessee.

This application raises a myriad of issues, but we will only focus here on the serious issues arising from the creation of yet another too-big-to-fail bank[2] (TBTF). The dramatic increase in TBTF banks should be a concern to everyone given the catastrophic threat they pose to the financial system and economy as well as to the livelihoods and standard of living of every American, all as proved by the 2008 crash. That threat is why TBTF banks on the brink of

[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, one that protects and promotes Americans' jobs, savings, retirements, and more.
[2] Of course, TBTF banks are not just too big, but also too complex, leveraged, interconnected, and concentrated, as well as engaged in too many high-risk activities and too essential to the proper functioning of the financial system. TBTF is a shorthand that includes all those characteristics.

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collapse and catastrophe are bailed out by policymakers, rather than allowed to fail and go bankrupt like every other company in America. This special carve out from the most basic rules of capitalism not only creates indefensible moral hazard but allows those banks to shift the costs of their unwise, negligent, reckless, or illegal conduct to the public. It is the worst example of privatizing gains and socializing losses, and all policymakers and regulators should prioritize putting an end to this intolerable situation.

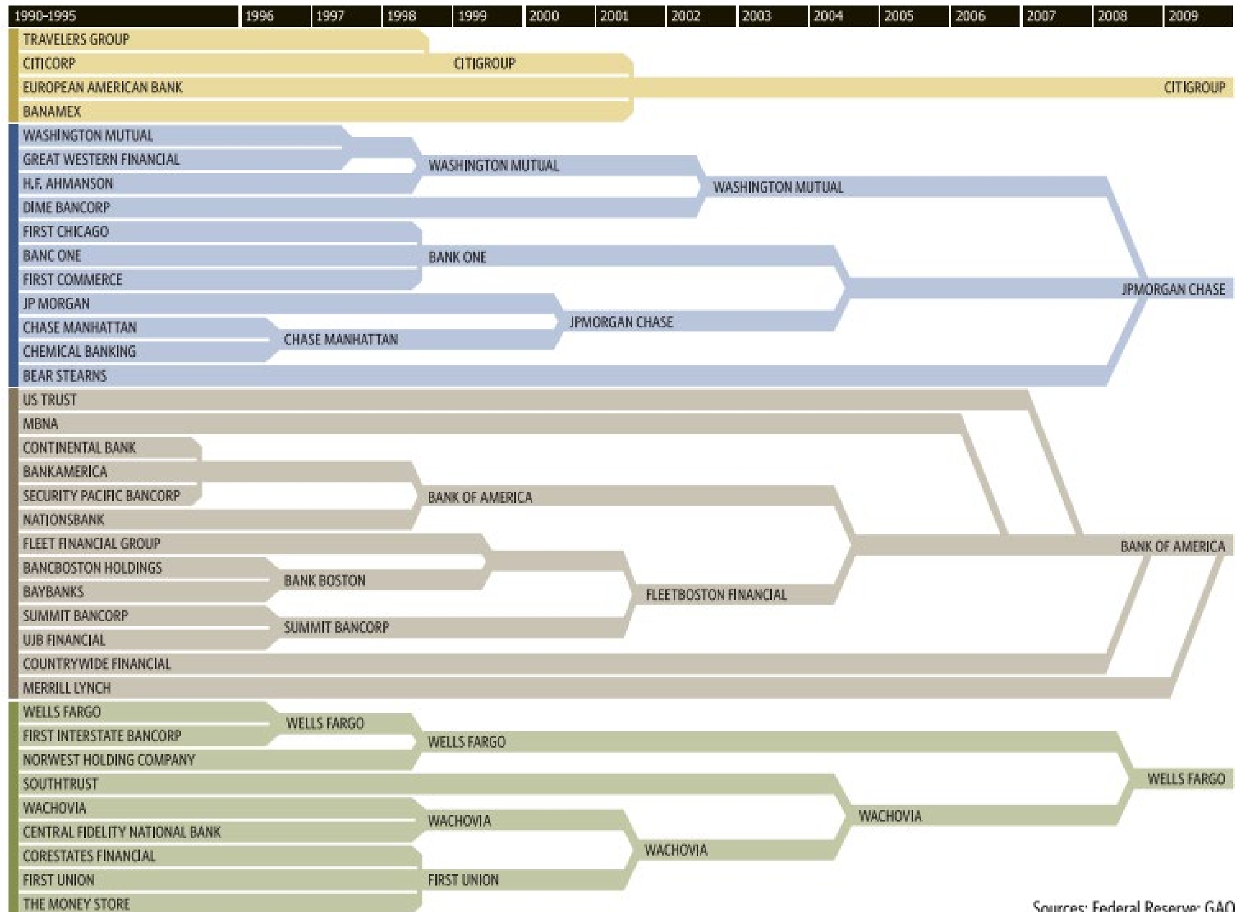
That begins with ensuring that banks, no matter how big, complex, leveraged, and interconnected, can fail and go through the bankruptcy process like all other companies without unacceptable collateral consequences. That means that banks must be required not only to have sufficient capital, liquidity, and other safety measures, but also a robust and workable resolution plan that will enable bankruptcy proceedings. Thus, a key criterion for reviewing much less approving any merger and acquisition application must be the submission of a robust resolution plan for the post-merger/post-acquisition entity. The federal banking agencies ("the Agencies") must then carefully scrutinize and test that plan to determine not just its robustness but also its actual utilization in a bankruptcy proceeding. The Agencies should subject TD Bank's application to such scrutiny and testing, ensuring that the post-merger entity can in fact be resolved in bankruptcy according to a robust resolution plan applicable to the combined entity.

Introduction

An insufficient merger review process, combined with other factors such as changes in laws and economic events, has contributed to massive consolidation in the banking industry over the last three and a half decades. More recently, as the Agencies have started to consider enhancements to the merger review process, there has been a race to create ever bigger and more complex Wall Street banks through mega mergers and acquisitions. Such mergers and acquisitions are reminiscent of the 2008 government-brokered takeovers of large, failing Wall Street banks by already TBTF banks,[3] as illustrated here:

[3] Bank of America acquired Merrill Lynch and Countrywide Financial; JPMorgan Chase acquired Bear Stearns and Washington Mutual; Wells Fargo acquired Wachovia.

1990- 2009 History of Consolidation for Citigroup, JP Morgan Chase, Bank of America, and Wells Fargo



The Agencies must enhance their review process to prevent large mergers from making the already unacceptable TBTF problem even worse and increasing the risks to financial stability, the economy, and all Americans. Because of its unique role as both the regulatory agency over holding companies and the agency charged with maintaining financial stability, we believe the Federal Reserve should lead this enhancement.

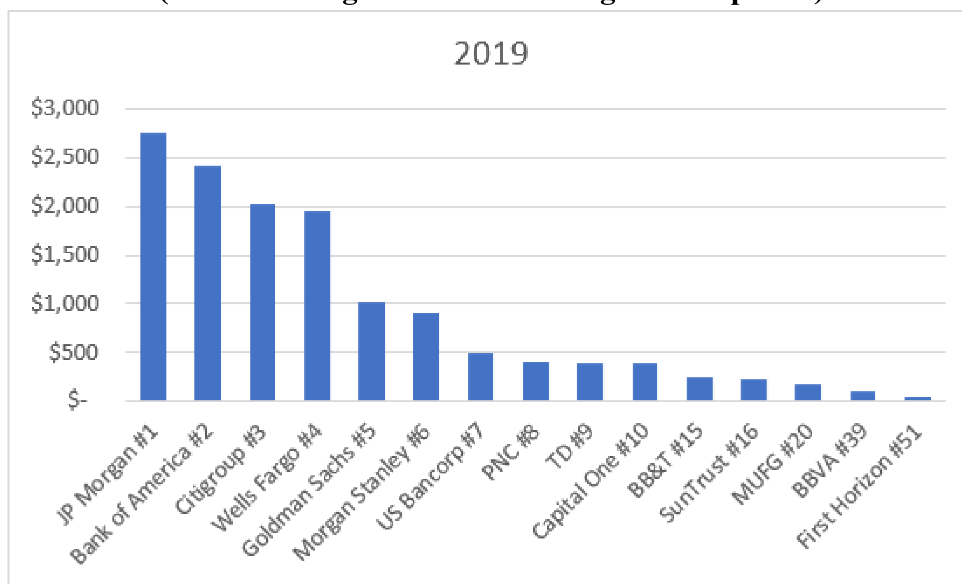
In just the last three years the two largest bank mergers since the 2008 global financial crisis were approved by the Federal Reserve and the Office of the Comptroller of the Currency ("OCC"). BB&T and SunTrust banks merged in 2019 to become the ninth largest bank holding company, now named Truist Financial, with $544 billion in assets. PNC Bank closed its acquisition of the US operations of BBVA last year and is now the tenth largest bank holding company with $541 billion in assets.

Two other mergers are currently being considered that would be even bigger. U.S. Bancorp has applied to acquire MUFG Union Bank, which would create the seventh largest bank, right after Morgan Stanley, with around $745 billion in assets. Additionally, TD Group US

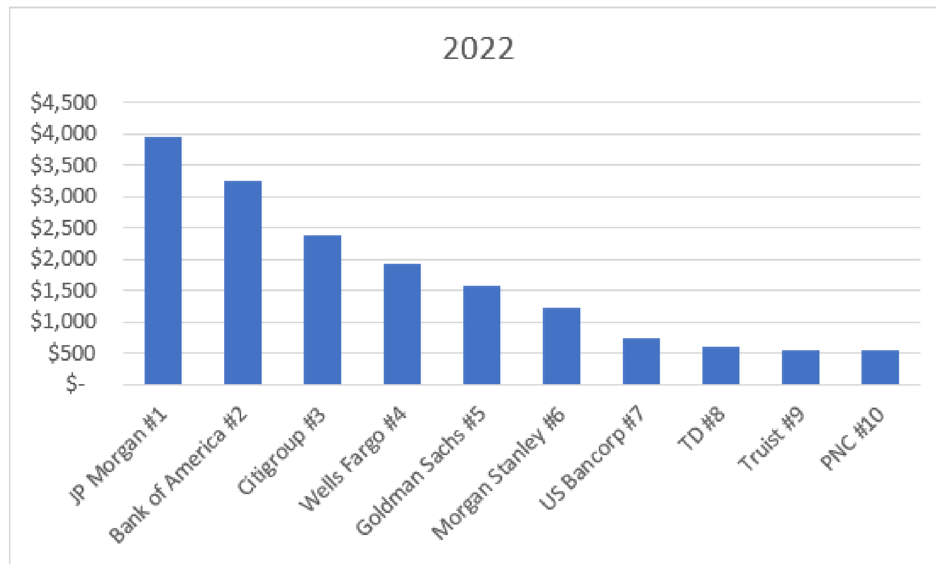
Holdings ("TD Bank") has applied to acquire First Horizon Corporation, which would create the eighth largest bank with around $610 billion in assets.[4] TD Bank has also announced that it is planning to acquire Cowen Inc., [5] an investment bank, which will increase its asset footprint by about another $9 billion.[6]

The figures below illustrate the scale of the post-merger consolidation for these banks. The first figure shows the ranking of these banks by total assets in 2019, before any of the mergers were completed. The second figure shows the ranking of the banks assuming all mergers have been completed, including those for US Bancorp and TD Bank.

Bank Holding Companies as Ranked by Total Assets
(2022 Ranking Assumes All Mergers Completed)



[4] Financial information for current total assets obtained from the Federal Financial Institution Examination Council's webpage for the National Information Center, "Large Holding Companies," https://www.ffiec.gov/npw/Institution/TopHoldings.
[5] TD Bank Group and Cowen Inc. joint press release (August 2, 2022), "TD to Expand its U.S. Investment Banking Business and Capabilities with Acquisition of Cowen Inc.," https://www.cowen.com/news/td-to-expand-its-u-s-investment-banking-business-and-capabilities-with-acquisition-of-cowen-inc/.
[6] Financial information on Cowen Inc. obtained from the Wall Street Journal, https://www.wsj.com/market-data/quotes/COWN/financials/annual/balance-sheet.



Assuming the TD Bank acquisition of Cowen closes, TD Bank will join the other recent megabanks, Truist Financial, PNC, and U.S. Bancorp, in also having substantial capital markets operations. Clearly, these banks are becoming not only larger but also more complex and interconnected throughout the financial system while engaging in more high-risk activities. This enlarged and expanded footprint undoubtedly increases the risks to financial stability and merits a more robust merger review process and requires an appropriate regulatory response.

Ending TBTF By Requiring Resolution Planning in the Merger Review Process

This continuing pace of large bank mergers is in significant part due to the insufficient assessment of factors in the merger review process other than anticompetitive effects. That does not have to be the case. The laws that are the foundation for the assessment process also require the Agencies to also consider financial stability, community needs, and financial and managerial resources. This provides the Agencies with substantial discretion as to how to include these other factors. Therefore, these factors should be elevated to their appropriate role in the process ***before more mega-merger applications are assessed***, including for the pending applications of TD Bank and U.S. Bancorp.

The factor of financial stability is of particular importance with regards to large bank mergers. The current process fails to perform a meaningful assessment of a merger's potential impact on financial stability. The agencies have a duty to fully and robustly assess the financial stability risks resulting from the mergers they review. This is much more significant now in light of the weakening of the regulatory framework that occurred during the Trump era, actions that

had the largest effect on banks with assets over $250 billion that are not formally classified as systemically important.[7]

Then-Governor, now Vice Chair, Brainard recognized this issue in a statement made after her abstention from voting on the PNC acquisition of the U.S. operations of BBVA:

> "The increases in banking concentration in the $250 to $700 billion asset size category, where common-sense safeguards have been weakened, raise some concerns, and it might be helpful to undertake a broader review of our framework, since we know from experience even noncomplex banks in this size range can pose risk to the financial system when they encounter financial distress."[8]

Clearly, the Agencies must do a better job of identifying and assessing systemic risks and financial stability concerns related to merger plans for large banks. Indeed, the publicly available documentation for large merger approvals that have been granted by the Federal Reserve and the OCC show that the financial stability/systemic risk review only involves a simple "analysis" based on the factors utilized to compute the so-called GSIB surcharge score. That is grossly insufficient because the GSIB surcharge scoring methodology provides a high-level framework for determining a capital surcharge but very little insight into the many ways risks could be posed to the banking system and greater financial system by a large bank.

Additionally, the final assessments of those factors are completely subjective and without justification. Former Governor Daniel Tarullo understatedly described the current process as "analytically underdeveloped."[9] The assessment of financial stability simply must be fully developed, more rigorous, and more meaningful targeted at the risks posed by these huge banks. The Agencies can and should do this by utilizing their existing tools and expanding them where necessary.

As we first discussed in our comment letter to the Department of Justice in February[10] and reiterated in a comment letter to the Federal Deposit Insurance Corporation in May,[11] for mergers that result in an institution above $250 billion, the Agencies should require the

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[7] *See* Better Markets whitepaper, Dennis Kelleher and Tim Clark (June 24, 2020), "No Financial Crash Yet Thanks to Dodd-Frank and Banking Reforms," https://bettermarkets.com/resources/white-paper-no-financial-crash-yet-thanks-dodd-frank-and-banking-reforms.pdf.

[8] Governor Lael Brainard (May 14, 2021), "Statement on PNC/BBVA Application by Governor Lael Brainard," Board of Governors of the Federal Reserve System, https://www.federalreserve.gov/newsevents/pressreleases/brainard-statement-20210514.htm.

[9] Daniel K. Tarullo (March 16, 2022), "Regulators should rethink the way they assess bank mergers," Brookings Institution, https://www.brookings.edu/opinions/regulators-should-rethink-the-way-they-assess-bank-mergers/.

[10] *See* Better Markets comment letter to the Department of Justice on whether and how the antitrust division should revise the 1995 bank merger competitive review guidelines (February 15, 2022), https://bettermarkets.org/wp-content/uploads/2022/02/Better-Markets-Comment-Letter-Bank-Merger-Guidelines.pdf.

[11] *See* Better Markets comment letter to the Federal Deposit Insurance Corporation on the rules, regulations, guidance, and statement of policy on 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.

submission of a combined full resolution plan for the merged entity along with the merger application. Such a plan would provide great insight into the complexity of the merged entity and its operations and allow for a thorough assessment of the implications of its failure on financial stability. After all, that is exactly the purpose of the resolution plan requirements. As we have said previously elsewhere, resolution planning "requires TBTF banks to plan for their own corporate demise in a way that will eliminate or minimize the collateral consequences to the financial system and the country. And, importantly, if they do not provide a credible plan to do so, then regulators have the substantial authority to require the TBTF bank to downsize, making it resolvable in bankruptcy like every other corporation in America."[12]

The OCC has taken a similar position. In May Acting Comptroller of the Currency Michael Hsu stated that one way to address systemic risk of large mergers would be to "condition approval on credible and verifiable commitments to achieving resolvability, tailored to the resolution risks of the resulting bank."[13] The best way to ensure this occurs is by requiring a resolution plan to be included in any application for the merged entity at the time the merger application is submitted for banks that are large enough to pose risk to the system, which includes large banks that are not designated as systemically important.

Importantly, resolution plans are widely recognized – including by the banking industry – as a critical component of ending TBTF. For example, even JP Morgan Chase CEO Jamie Dimon has recognized the importance of resolution plans for financial stability:

> "We have to get rid of anything that looks like too-big-to-fail. We have to allow our big institutions to fail. It is part of the health of the system, and we should not prop them up. We have to allow them to fail. And I would go one step further. ***You want to be sure that they can fail and not damage the American economy and the American public***."[14]

Jamie Dimon is 100% right.

In other words, resolution preparedness is necessary to have confidence that large banks can be shut down and be taken apart and sold off piece-by-piece more easily and without causing damage to financial markets and the economy.

Requiring robust, workable resolution plans before any merger or acquisition is considered much less approved would end TBTF; it would end the rampant moral hazard; it

[12] Better Markets (January 2016), "Ending Too-Big-to-Fail by Breathing Life into 'Living Wills'," https://bettermarkets.org/wp-content/uploads/2021/07/Breathing-Life-Into-Living-Wills_0.pdf.
[13] Acting Comptroller of the Currency Michael J. Hsu (May 9, 2022), "Bank Mergers and Industry Resiliency," Office of the Comptroller of the Currency, https://www.occ.gov/news-issuances/speeches/2022/pub-speech-2022-49.pdf.
[14] Testimony of Jamie Dimon, Chairman and CEO of JPMorgan Chase & Co. before United States Senate Committee on Banking, Housing, and Urban Affairs, Hearing on "A Breakdown in Risk Management: What Went Wrong at JPMorgan Chase?" (June 13, 2012), https://www.govinfo.gov/content/pkg/CHRG-112shrg78850/pdf/CHRG-112shrg78850.pdf (emphasis added).

would end the risk of taxpayer bailouts; and it would end the special interest carve out for banks from the most basic rule of capitalism: failure means bankruptcy. It would also take away the Hobson's choice faced by policymakers and regulators when financial stress and crisis happens: ***bailout banks or inflict cataclysmic harm to the American people.***

Strengthening of the Resolution Planning Process Is Necessary

The effectiveness of resolution plans must be strengthened, not only for future merger assessments but also to better mitigate risks to financial stability and the TBTF problem more generally. The submission of so-called "living wills" should return to a two-year cycle from the four to six-year cycle currently required under the weakened regulation. This would increase their relevancy. It is important to remember that in 2008 Bear Stearns was around $400 billion in assets when it required a Federal Reserve-brokered (and materially supported) fire sale and Lehman Brothers was around $640 billion at the time it collapsed. Had living wills been required for these firms, they would have been essentially useless if they were six years old as is provided for under the Federal Reserve's current rules for banks between $250 billion to $700 billion.

Even more importantly, many of the Federal Reserve's resolution plan expectations – particularly those for certain capital and liquidity needs, as well as for simpler bank structure – should be made part of legally binding rules, rather than only being articulated through non-binding "supervisory guidance,"[15] as is currently the case. That is, large banks should have to bear the costs associated with simplifying their possible resolution in advance by making them take actions now so that they can be more easily resolved should they fail. A key component of this would be clarifying through regulation any requirements for capital and liquidity. This would include requiring large banks to pre-capitalize and pre-fund certain material subsidiaries and affiliates. Currently, the guidance includes an *expectation* that banks model resolution capital and liquidity needs for each material entity and hold and pre-position sufficient resources to meet those needs. As proved during the 2008 Crash, in times of severe stress, capital and liquidity likely will not be able to be easily moved from one affiliate/subsidiary to another, especially across jurisdictions, highlighting the necessity to pre-position capital and liquidity resources. Given the importance of making large banks more resolvable, relying on supervisory guidance for these critical elements of resolution preparedness is not enough. Moreover, "expectations" are insufficient. These must be enforceable conditions and requirements.

Finally, there must be more public transparency to the resolution planning process and involvement by additional, external parties that are necessary to make the process credible.[16] More information must be publicly disclosed about the purposes, methods, and criteria that

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[15] *See* Better Markets comment letter to Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, and Bureau of Consumer Financial Protection regarding the proposed rule to codify the role of supervisory guidance in the supervisory process (January 4, 2021), https://www.bettermarkets.org/sites/default/files/Better%20Markets%20Comment%20Letter%20on%20Notice%20of%20Proposed%20Rulemaking%20-%20Role%20of%20Supervisory%20Guidance.pdf.

[16] *Supra* note 12.

underlie the process and about the information contained in the resolution plans, if not public disclosure of the resolution plans themselves. Also, financial institutions should be required to disclose the amount of financing necessary to effectuate a reorganization under the Bankruptcy Code and the source of that funding under various scenarios. Greater public disclosure would not only strengthen market discipline but also improve the credibility of the process. Additionally, the process must include the input of external parties, similar to resolutions under the Bankruptcy Code. This includes seeking the input of an institution's major creditors, potential sources of financing, and potential purchasers of assets as well as establishing independent advisory committees consisting of bankruptcy scholars, lawyers, and judges.

Financial Stability Risks Must be Robustly Assessed in the Merger Review Process

For mergers that result in an institution above $250 billion, more analysis must be conducted to assess risks to financial stability other than simply utilizing the GSIB surcharge metrics. These metrics on their own are insufficient to determine the possible risks an institution could pose to the financial system because they are simply an institution's share of global exposure that is related to a given metric. For example, one metric assesses an institution's cross-jurisdictional activity by dividing its cross-jurisdictional claims and liabilities by global aggregate amounts. In other words, it only shows the relative size of an exposure type, which provides no real insight as to how those exposures may lead to knock-on impacts and systemic instability.

The Federal Reserve has a division entirely dedicated to the analysis of financial stability – the Division of Financial Stability – which should conduct and provide a public assessment of the financial stability concerns that the merged entity could raise on its own and in the context of the banking system and greater financial system. At the very least, an assessment should be conducted of the potential impact to funding markets that would be caused by serious distress or failure of the merged bank. The collapse of Bear Stearns and Lehman Brothers significantly contributed to stress in short-term funding markets, which are critical to the functioning of the financial system and economy, even though they were around $400 billion and $640 billion in assets, respectively, in 2008. These firms would not have been classified as GSIBs but their distressed financial condition caused significant turmoil in funding markets.

Conclusion

Chair Powell has stated that the current merger review process would continue to be utilized and that "any changes that would come would either come through legislation or through new personnel at the Fed."[17] With three new and distinguished members of the board in place, including a Vice Chair for Supervision, the current process must not be utilized to assess the financial stability risks of the mega-mergers under consideration. Doing so would grossly

[17] Federal Reserve Board Chair Jerome Powell before the U.S. House Committee on Financial Services (March 2, 2022), "Monetary Policy and the State of the Economy," https://financialservices.house.gov/events/eventsingle.aspx?EventID=409029.

insufficient and increase the likelihood of taxpayer bailouts, forced acquisitions, and the need for the Federal Reserve to use trillions of dollars to bail out the financial markets yet again. It is past time to end the Hobson's choice. Now is the time to do it.

We appreciate your attention to this issue and urge you to enhance the merger review process as soon as possible. We would be pleased to discuss these matters further at your convenience.

Sincerely,

Dennis M. Kelleher
President and CEO

Phillip G. Basil
Director of Banking Policy

CC: Martin Gruenberg
Acting Chair
Federal Deposit Insurance Corporation

Ann E. Misback
Secretary of the Board
Board of Governors of the Federal Reserve System

Jason Almonte
Director for Large Bank Licensing
Office of the Comptroller of the Currency