June 14, 2024

Office of the Comptroller of the Currency
Chief Counsel's Office
Attention: Comment Processing
400 7th Street SW, Suite 3E–218
Washington, DC 20219

Re: Business Combinations Under the Bank Merger Act; RIN: 1557–AF24; Document Number OCC-2023-0017; 89 FR 10010 (Feb. 13, 2024)

Dear Ladies and Gentlemen:

Better Markets[1] appreciates the opportunity to comment on a proposed rule ("Proposal") intended to increase the transparency of standards that apply to business combinations ("mergers") involving national banks and Federal savings associations, facilitate interagency coordination, and enhance public engagement.[2] The Proposal has been issued by the Office of the Comptroller of the Currency ("OCC" or "Agency") and is distinct from the Federal Deposit Insurance Corporation ("FDIC") proposal on bank merger transactions that was announced about two months later.[3]

The Proposal would make two key changes to the OCC's current policies that allow certain mergers to receive expedited—and therefore limited—review:

1. Removal of automatic approval after 15 days unless the OCC notifies the applicant that expedited processing is extended or not available. This change would make it so no merger would be approved simply with the passage of time.

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[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] 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* Business Combinations Under the Bank Merger Act; Extension of Comment Period; RIN: 1557–AF24; Document Number OCC-2023-0017; 89 FED. REG. 26106 (Apr. 15, 2024), https://www.federalregister.gov/documents/2024/04/15/2024-07876/business-combinations-under-the-bank-merger-act-extension-of-comment-period.

[3] 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.

2. Removal of the current allowance for a streamlined application for some mergers. This change would require the use of the full Interagency Bank Merger Act Application for all merger transactions involving the OCC.[4]

The Proposal would also add an Appendix containing multiple lists of factors that the OCC would consider during the merger application process, including:

- general features of merger applications that are "consistent with approval" and those that "raise supervisory or regulatory concern," and
- financial stability; financial and managerial resources and future prospects; and convenience and needs aspects of the merger transaction, acquiring institution, and target institution.[5]

We fully support the first two changes because they remove paths that are currently available for some mergers to evade regulatory scrutiny. These changes will also allow for appropriate public input on merger transactions. However, we strongly oppose the Appendix policy statement. While it is true that the OCC, and all banking regulators, need to provide more clarity and detail related to the merger approval process, the proposed Appendix moves in the wrong direction by codifying a set of broad, vague statements rather than defining specific guidelines to govern bank mergers.

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.[6]

Since the mid-1980s, the number of commercial banks in the US has declined by roughly 70 percent.[7] This consolidation has overwhelmingly occurred among the largest institutions (see Chart 1).[8] Between 1984 and 2011, the number of institutions with total assets of $10 billion or more increased from 32 to 107 but the assets these institutions controlled grew from about $1 trillion (27% of industry assets) in 1984 to $11.1 trillion (80% of industry assets) by 2011.[9] The four Wall Street megabanks account for much of this growth, increasing from an aggregate market

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4 Business Combinations Under the Bank Merger Act, *supra* note 2 at 10011.

5 *Id*. at 10012.

6 *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.

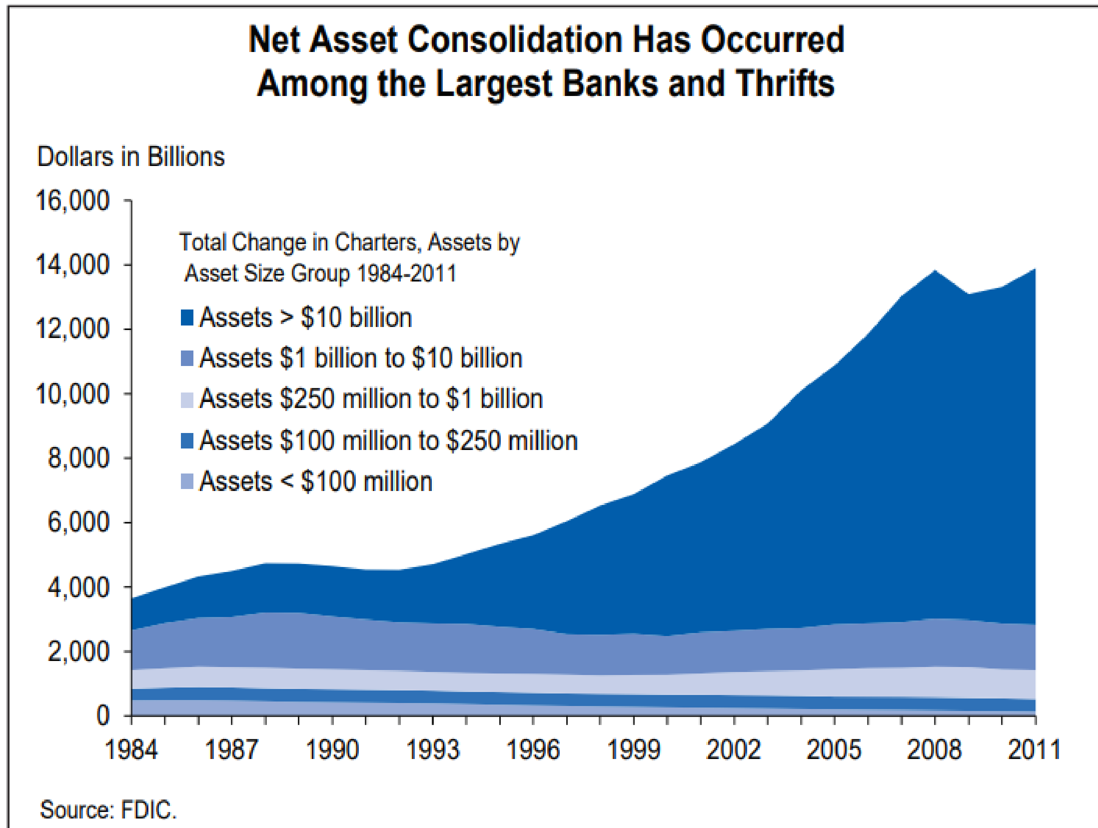
7 Federal Deposit Insurance Corporation, *BankFind Suite: Find Annual Historical Bank Data*, https://banks.data.fdic.gov/bankfind-suite/historical (last accessed Apr. 4, 2024).

8 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.

9 *Id*. at § 2.2 – 2.3.

share of just 6.2 percent of total banking industry assets in 1984 to more than 40% of industry assets by 2011.[10]

Chart 1



The pace of mergers increased substantially after Congress passed a law in 1994 that codified the right to interstate banking at a national level.[11] That consolidation became a frenzied merger wave after the 1999 Gramm-Leach-Bliley Act[12] repealed the portion of the Glass-Steagall Act of 1933[13] 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).[14]

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10 *Id*. at § 2.4.

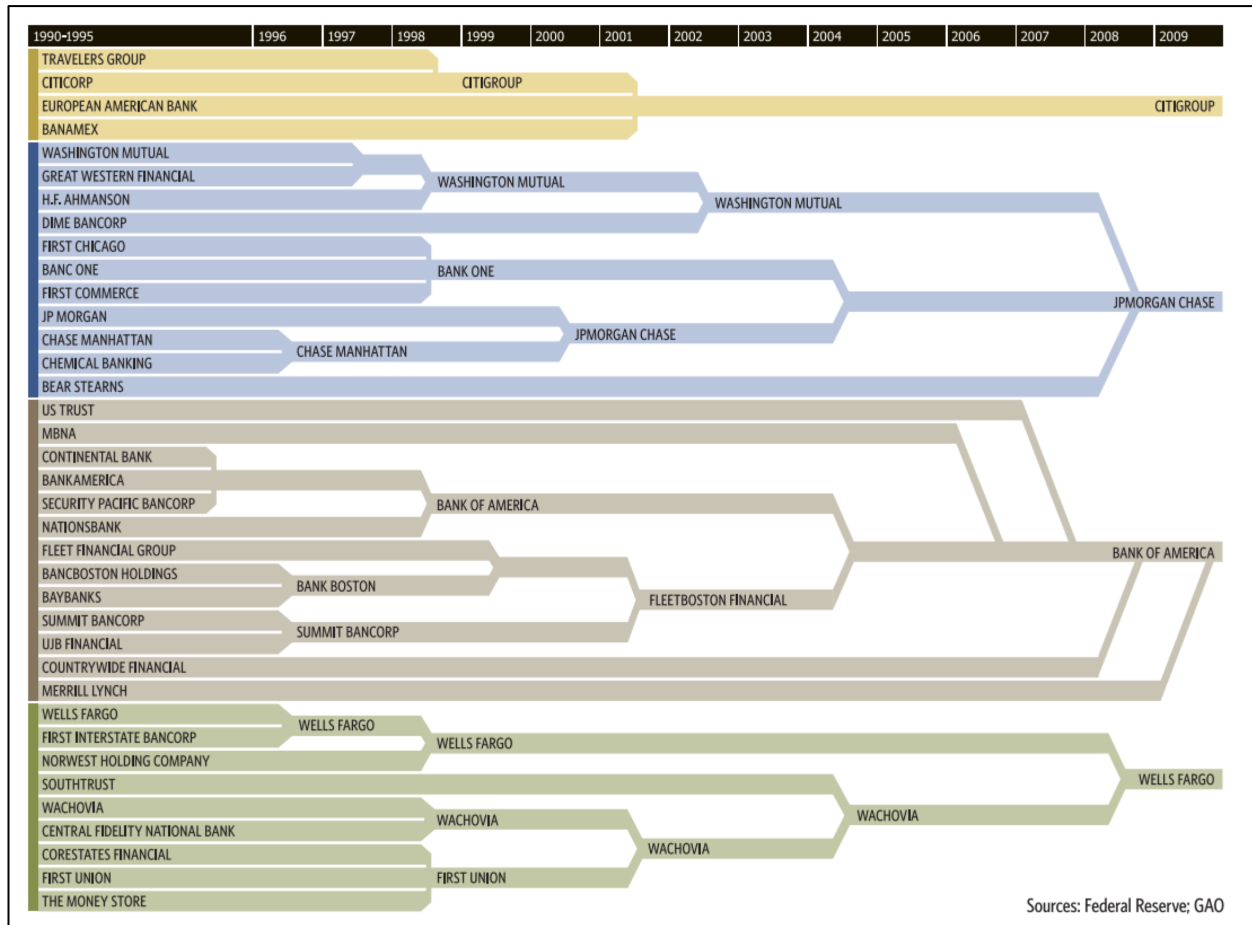
11 The Riegle-Neal Interstate Banking and Branching Efficiency Act, 12 USC § 1811.

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

13 The Glass-Steagall Act of 1933, Public Law No. 66-73D.

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

Chart 2



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 U.S. bank, JPMorgan Chase, to get even bigger.[15]

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15 *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.

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.[16]

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 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.[17]

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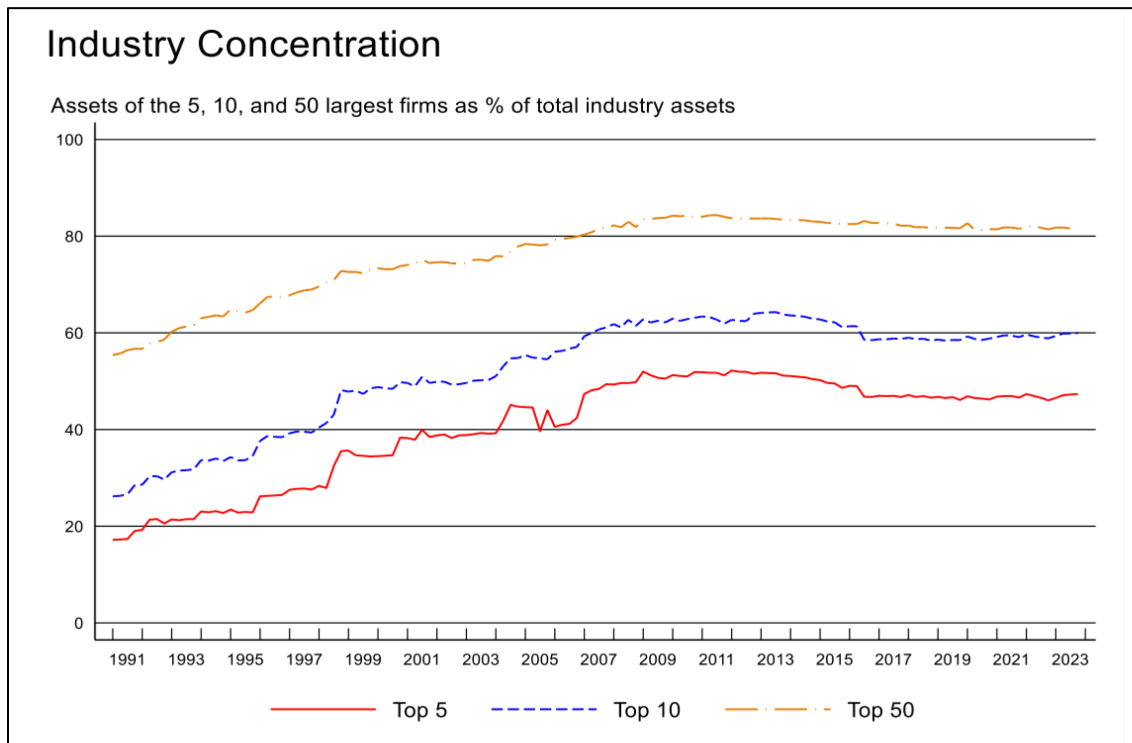
[16] Jeremy C. Kress, *Modernizing Bank Merger Review*, 37 YALE J. ON R. 435, 456–57 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3440914.

[17] *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).

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.[18] 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. 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%.[19] 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 industry concentration is even higher for banks alone, with the top 50 firms consistently having more than 80% of industry assets since 2008 (see Chart 3).[20]

Chart 3



[18] 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/.

[19] 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).

[20] 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.

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.[21] 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.[22] 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.[23]

The OCC has said that it is focused on strengthening the merger review process, including considering how assessments of competition, convenience and needs, and financial stability can be improved.[24] For example, in February 2023, the OCC hosted a symposium on bank mergers at which Better Markets' Distinguished Senior Banking Advisor Tim P. Clark participated on a panel discussing financial stability issues related to mergers.[25] Then, at a congressional hearing in May 2023, Michael Hsu, Acting Comptroller of the Currency, said that the OCC recognizes the need for updated analytic frameworks for bank merger guidelines.[26]

However, the OCC has 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, at the same congressional hearing, Hsu stated that the OCC would be "open-minded" to bank mergers,[27] suggesting support for the country's megabanks growing even larger. The OCC proved this with the approval of JPMorgan's acquisition of the failed First Republic Bank on May 1, 2023,[28] which resulted in JPMorgan

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21 *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.

22 *Id*.

23 *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.

24 *See* Remarks by Acting Comptroller of the Currency Michael J. Hsu, Office of the Comptroller of the Currency, *Opening Remarks for the OCC Bank Merger Symposium* (Feb. 10, 2023), https://www.occ.gov/news-issuances/speeches/2023/pub-speech-2023-15.pdf.

25 *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, OCC BANK MERGER SYMPOSIUM (FEB. 10, 2023), https://www.occ.gov/news-events/events/files/event-occ-bank-merger-symposium.html (last visited Apr. 4, 2024).

26 *See e.g.*, Statement of Michael J. Hsu Acting Comptroller of the Currency Before the Committee on Financial Services United States House of Representatives 4 (May 16, 2023), https://www.occ.treas.gov/news-issuances/congressional-testimony/2023/ct-occ-2023-44-written.pdf.

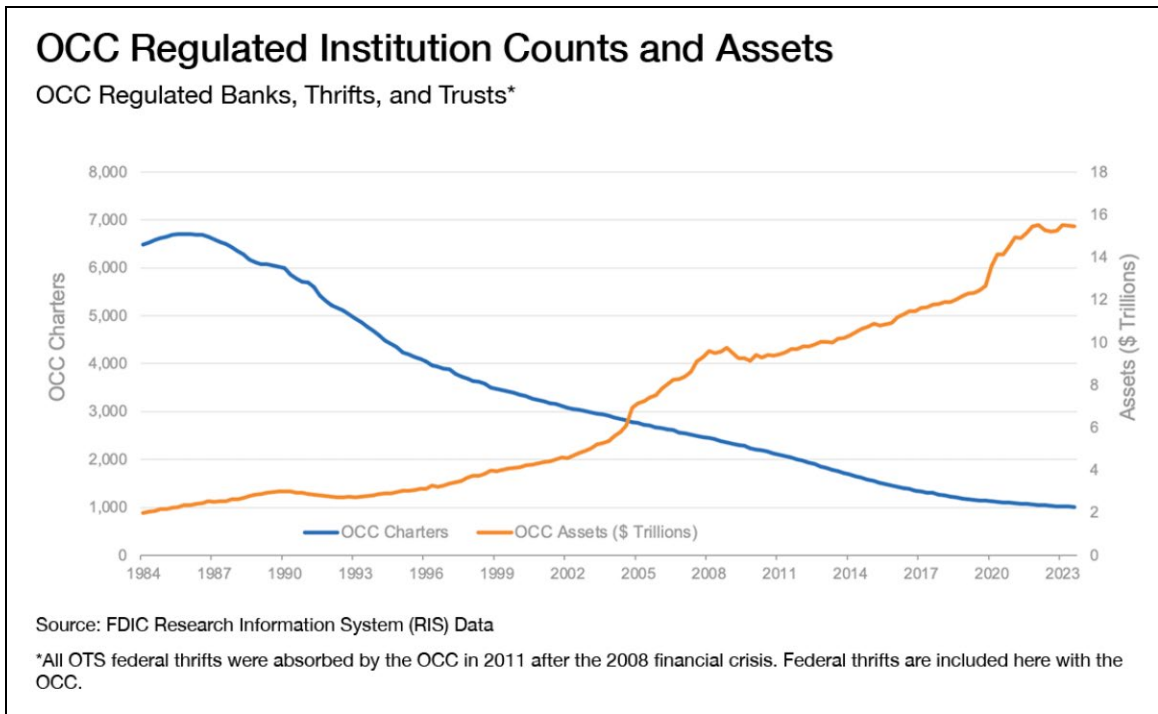
27 *Id.*

28 *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 15.

growing by more than $220 billion. 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.[29]

Data from 1984 through 2023 show a decades-long trend of rapid growth and increasing concentration for OCC-supervised banks (see Chart 4).[30]

Chart 4



In 1984, the OCC supervised nearly 6,500 institutions with about $2 trillion in aggregate assets. By 2023, the OCC supervised about 1,000 institutions with aggregate assets of nearly $16 trillion.[31] Hsu attributed the consolidation to the evolution of the broader economy, saying "we don't exist to serve banks; banks exist to serve us. . . . Economies and banking systems coevolve."[32] He continued to explain that consolidation is a result of "profound changes in the economy,

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29 *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.

30 *See* Remarks by Acting Comptroller of the Currency Michael J. Hsu, Office of the Comptroller of the Currency, *What Should the U.S. Banking System Look Like? Diverse, Dynamic, and Balanced* 2 (Jan. 29, 2024), https://occ.gov/news-issuances/speeches/2024/pub-speech-2024-6.pdf.

31 *Id.*

32 *Id*. at 4.

including globalization and the rise of multinational corporations, the rapid growth of information technology, and significant corporate consolidation."[33] ***This view, however, dangerously discounts the increase in TBTF banks that present serious threats to financial stability. Furthermore, the OCC's interpretation and implementation of merger policy over the last several decades has contributed to the consolidation trend.***

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 additional scrutiny for mergers along with many other activities, protects the public and limits negative externalities.[37] Therefore, it is imperative that the OCC 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 would make two valuable changes to current policies that allow certain mergers to receive expedited—and therefore limited—review:

1. Removal of automatic approval of merger transactions after 15 days unless the OCC notifies the applicant that expedited processing is extended or not available.
2. Removal of the current allowance for a streamlined process for some merger applications.[38]

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33 *Id*. at 7.

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 16 at 466.

38 Business Combinations Under the Bank Merger Act, *supra* note 2 at 10011.

The Proposal would also add an Appendix containing lists of features of merger applications that are "consistent with approval" and those that "raise supervisory or regulatory concerns." The Appendix also lists factors that would be considered when the OCC evaluates financial stability concerns; financial and managerial resource concerns; and convenience and needs. Finally, the Appendix presents a set of considerations that the OCC includes in its decision of whether to hold a public meeting to gather input on the proposed merger.[39]

The Proposal states that applications that are "consistent with approval generally feature all of the following indicators:"

1. The acquirer is **well capitalized** and the resulting institution will be well capitalized;
2. The resulting institution will have **total assets less than $50 billion**;
3. The acquirer has a **Community Reinvestment Act (CRA) rating of Outstanding or Satisfactory**;
4. The acquirer has a **composite and management ratings of 1 or 2**;
5. The acquirer has a **consumer compliance rating of 1 or 2**;
6. The acquirer has **no open formal or informal enforcement actions**;
7. The acquirer has **no open or pending fair lending actions**, including referrals or notifications to other agencies;
8. The acquirer is **effective in combatting money laundering activities**;
9. The target's **combined total assets are less than or equal to 50% of the acquirer's total assets**;
10. The target is an **eligible depository institution**;
11. The proposed transaction **clearly would not have a significant adverse effect on competition**;
12. The **OCC has not identified a significant legal or policy issue**; and
13. **No adverse comment has raised a significant CRA or consumer compliance concern**.[40]

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[39] *Id*. at 10016–18.

[40] *Id*. at 10016 (emphasis added).

The Proposal also provides examples of factors that "raise supervisory or regulatory concerns:"

1. The acquirer has a **CRA rating of Needs to Improve or Substantial Noncompliance**;
2. The acquirer has a **consumer compliance rating of 3 or worse**;
3. The acquirer has **composite or management ratings of 3 or worse or the most recent report of examination otherwise indicates that the acquirer is not financially sound or well managed**;
4. The acquirer is a **global systemically important banking organization ("GSIB"), or subsidiary thereof**;
5. The acquirer has **open or pending Bank Secrecy Act/Anti-money Laundering enforcement or fair lending actions, including referrals or notifications to other agencies**; and
6. Failure by the **acquirer to adopt, implement, and adhere to all the corrective actions required by a formal enforcement action in a timely manner; or multiple enforcement actions against the acquirer executed or outstanding during a three-year period**.[41]

SUMMARY OF COMMENTS

As stated, we strongly support the Proposal's elimination of expedited processing avenues. However, the Proposal does not go far enough with clarity in other areas and contains inappropriate loopholes that would allow for last-minute mergers to continue and threaten financial stability and consumer protection. Therefore, we recommend the following changes to the Proposal:

- Remove the allowance for Agency discretion to reduce the information that merger applicants need to provide to the OCC. While we support the elimination of expedited processing and streamlined applications, the fact that the Proposal gives the Agency the option to not follow its own rule, at its own discretion, completely undermines the effectiveness of the change. It is even more dangerous because the Proposal cites the example of a failing bank transaction, such as the May 2023 JPMorgan takeover of First Republic Bank, where the largest Wall Street megabank became even larger and more powerful, as a case in which the rules could be bent.

[41] *Id*. (emphasis added).

- Revise the lists of items in the Appendix to be more specific and binding to increase clarity for banks, regulators, and the public. The current language in the Proposal's appendix is too vague to be helpful or strengthen the OCC's merger approval process. Furthermore, the lists are structured in a way that does not reduce uncertainty and to include them in a rule dangerously codifies a vague set of parameters.

- Increase cooperation and coordination of merger policies and procedures among the banking agencies, to reduce regulatory arbitrage. In addition to this Proposal, the FDIC has a separate and distinct proposal for bank merger guidelines.[42] The Federal Reserve has stated that it is unlikely to update its merger policies at this time.[43] 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 system and the American people would better serve the country.

- Maintain robust and extensive information collection in merger applications. The information collection that would be necessary to conduct a robust analysis of potential mergers 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. REMOVE THE ALLOWANCE FOR AGENCY DISCRETION TO REDUCE THE INFORMATION THAT MERGER APPLICANTS NEED TO PROVIDE TO THE OCC.

The elimination of expedited processing and streamlined applications is a welcome and needed change that would theoretically strengthen the OCC's merger application review process. However, the Proposal also contains unnecessary and problematic loopholes that allow the Agency leeway to not follow its own rule, at its own discretion which completely undermines the effectiveness of the change. Specifically, the Proposal states:

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[42] Request for Comment on Proposed Statement of Policy on Bank Merger Transactions, *supra* note 3.

[43] *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.

> [I]nformation requested in the Interagency Bank Merger Act Application may be tailored as appropriate. For example, ***there may be situations where discussion of all items in the Interagency Bank Merger Act Application may not be appropriate, such as purchase and assumption transactions from an insured depository institution in Federal Deposit Insurance Corporation receivership***. In these circumstances, the OCC can use its discretion to ***reduce the information*** that the applicant needs to provide to the OCC.[44]

This language is vague and does not specify, beyond the one example of an acquisition of a failing bank, the cases in which the OCC can exercise this discretion. As was demonstrated by the approval of JPMorgan's acquisition of First Republic Bank in May 2023, 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.[45] 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 forgoing a robust analysis and assessment of the merger transaction.

We recommend that this allowance for discretion be removed from the Proposal. Especially for the country's largest banks, many of which are supervised by the OCC and therefore would be subject to a rule resulting from this Proposal, it is critical to ensure that the Agency has fully considered all factors including financial stability; financial and managerial resources and future prospects; and convenience and needs ***before*** approving the merger transaction.

II. REVISE THE LISTS OF ITEMS IN THE APPENDIX TO BE MORE SPECIFIC AND BINDING TO INCREASE CLARITY FOR BANKS, REGULATORS, AND THE PUBLIC.

The Proposal contains several lists of considerations that the OCC considers in the merger application and approval process. There are several problems with these lists:

- First, the lists codify general guidelines that the OCC presently uses in its evaluation of bank merger applications, rather than strengthening the merger process. For example, in reference to the Proposal, Hsu stated, "a lot of this was unwritten, the point of this is to just write it down."[46]

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44 Business Combinations Under the Bank Merger Act, *supra* note 2 at 10011 (emphasis added).

45 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).

46 Pete Schroeder, *US Bank Regulator to Boost Transparency of Merger Reviews*, REUTERS (Jan. 29, 2024), https://www.reuters.com/business/finance/us-bank-regulator-boost-transparency-merger-reviews-scrap-automatic-approvals-2024-01-29/.

- Second, the language used is unclear. For example, the first list in the Appendix says, "Applications that are consistent with approval generally feature all of the following indicators."[47] This brings up many more questions. For instance, how many items can be missing for approval to still be considered? Are there certain items that can never be missing, such as an institution being well capitalized or having no open enforcement actions? And does "consistent with approval" which refers to past practice translate into "will be approved" in the future?

- Third, the combination of a list of factors that are "consistent with approval" and a list of factors that "raise supervisory or regulatory concerns" leaves a wide gap of characteristics that do not fit in either category and thus are presumably left to the OCC's discretion. For example, the Proposal says that resulting institutions that will have total assets less than $50 billion are generally consistent with approval while merger transactions involving GSIBs raise concerns. However, it is silent on transactions that result in an institution with more than $50 billion in total assets but do not involve GSIBs. Similarly, the Proposal says that having no open enforcement actions is a feature of mergers that are typically approved, but it does not address situations in which the acquirer or the target institution has a history of enforcement actions or discrimination but does not have any actions that are currently open. Related to this problem, Hsu stated:

  > Merger applications exist along a spectrum. Some have significant deficiencies. Others are straightforward because the acquiring bank is a model of safety and soundness and has earned the trust of the community and its supervisors. The majority lie somewhere in between and require varying degrees of scrutiny and multiple rounds of inquiry. The transparency provided in our proposed policy statement effectively proposes chalk lines demarcating these three groups.[48]

  As is clear, the framework within the Proposal leaves a wide gap between two ***very blurry*** chalk lines, resulting in little more clarity than currently exists.

- Finally, the lists that address the factors of financial stability; financial and managerial resources and future prospects; and convenience and needs only present questions and topics with no specifics at all. For instance:

  - On the Financial Stability list, the first item is "Whether the proposed transaction would result in a material increase in risks to financial system stability due to an increase in size of the combining institutions" but no details about the size at which this concern becomes relevant and how financial stability risk will be measured or evaluated are included.

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47 Business Combinations Under the Bank Merger Act, *supra* note 2 at 10016.

48 Office of the Comptroller of the Currency, *Acting Comptroller of the Currency Michael J. Hsu "What Should the U.S. Banking System Look Like? Diverse, Dynamic, and Balanced"* 15–16 (Jan. 29, 2024), https://occ.gov/news-issuances/speeches/2024/pub-speech-2024-6.pdf.

- On the Financial and Managerial Resources list, "[t]he OCC considers the supervisory record and current condition of both the acquirer and target to determine if the resulting institutions will have sufficient managerial resources to manage the resulting institution" without defining clearly what constitutes sufficient resources. Furthermore, the description states that "Less than satisfactory ratings at the target do not preclude the approval of a transaction, provided that the acquirer can employ sufficiently robust risk management and financial resources to correct the weaknesses at the target" but does not specify what "sufficiently robust risk management and financial resources" actually are.

- The Convenience and Needs list contains a variety of factors such as plans to change branch presence in low- and moderate-income areas, change the cost of banking products, change the availability of banking products, or cut jobs within bank offices but does not include any clarity around what is, and is not, appropriate or acceptable with regard to those factors.

There are similar problems with clarity and detail in virtually every item on the lists within the Appendix. Therefore, ***we recommend they either be revised to be much more specific or removed from the Proposal entirely***. In the current form, the lists actually cloud transparency more than help it because they are so vague.

Furthermore, if the lists are simply "writing down" the OCC's current framework and considerations for mergers, the Agency's recent track record demonstrates how misguided a resulting rule will be. Given the facts surrounding New York Community Bancorp Flagstar Bank's ("Flagstar") approved acquisitions of New York Community Bank ("NYCB") and Signature Bank ("Signature")[49] the regulators apparently overlooked, ignored, or provided significant leeway on many items on the lists within the Proposal. For instance:

- ***The resulting institution will have total assets less than $50 billion.***
  - Flagstar's acquisition of NYCB resulted in total assets of $90 billion. Then, Flagstar's acquisition of Signature just weeks later resulted in total assets of $123 billion.[50]

- ***The acquirer has no open formal or informal enforcement actions, and***
- ***The acquirer has no open or pending fair lending actions, including referrals or notifications to other agencies.***

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49 *See* 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.

50 *Id*. at 1.

  - While the public record does not disclose any open formal or information enforcement actions or open or pending fair lending actions, Flagstar had a pattern of discriminatory practices and fair lending failings. These were reportedly severe enough that the FDIC would not support the merger application and despite the fact that the OCC had similar concerns,[51] it still approved the mergers.

- ***The target's combined total assets are less than or equal to 50% of the acquirer's total assets.***
  - NYCB (the target) had $63 billion in total assets as of September 30, 2022, the last date for which financial information was reported prior to the merger. This was ***more than double*** the $25 billion asset size of Flagstar (the acquirer).[52]

- ***Whether the proposed transaction would result in a material increase in risks to financial system stability due to an increase in size of the combining institutions.***
  - The resulting institution, with $123 billion exceeds the size of Signature Bank at the time of failure, an institution for which the federal government declared a systemic risk exception. Better Markets[53]

- ***The acquirer has experienced rapid growth, and***
- ***The acquirer has engaged in multiple acquisitions with overlapping integration periods.***
  - Flagstar's growth exceeded what was reported by all three of the 2023 regional banks in the years leading up to their failures. Over the course of just two quarters, Flagstar's two acquisitions ***quadrupled*** its asset size, from $25 billion on September 30, 2022, to $123 billion on March 31, 2023. It also more than doubled its employee count, from about 2,800 in September 2022 to 6,800 in March 2023.[54]

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[51] *See* Jon Shazar, *Lending Discrimination Against Minorities Still *Technically* Illegal, But Not Something Banks Have To Sweat*, DEALBREAKER (July 14, 2020), https://dealbreaker.com/2020/07/occ-no-redlining-fines.

[52] Better Markets, *supra* note 49 at 2.

[53] *Id.*; see also Federal Deposit Insurance Corporation, *FDIC Establishes Signature Bridge Bank, N.A., as Successor to Signature Bank, New York, NY* (Mar. 12, 2023), https://www.fdic.gov/news/press-releases/2023/pr23018.html.

[54] Better Markets, *supra* note 49 at 5.

- ***The acquirer is functionally the target in the transaction.***
    - NYCB was originally the acquirer and Flagstar was the target in the attempted merger in 2021. When that application was not approved by the FDIC, Flagstar became the acquirer and NYCB became the target, even though Flagstar was less than half the size of NYCB.[55]

- ***The OCC considers the supervisory record and current condition of both the acquirer and target to determine if the resulting institutions will have sufficient managerial resources to manage the resulting institution.***
    - The rapid succession of two mergers, only about 100 days apart, brings into question Flagstar's bandwidth and ability to properly assess, manage, and integrate NYCB's operations, systems, controls, management, and other typical facets of post-merger activities before it virtually immediately had to do the same with Signature after its failure.

The factors in the list above are only those that we could discern as problematic from public information. Many of the items on the Proposal's lists involve nonpublic or confidential supervisory information and cannot be assessed externally. However, the limited publicly available information clearly indicates that the OCC's current framework and considerations for mergers are grossly deficient.

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

In addition to this Proposal, the FDIC has a separate and distinct proposal for bank merger guidelines.[56] The Federal Reserve also has separate policies and has stated that it is unlikely to update those policies at this time.[57] 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 NYCB and Signature clearly proves the damage that can result from inconsistent policies among regulators and uneven application of those policies. After trying and failing to get FDIC and Fed approval, NYC Bancorp shopped for a more friendly regulator, the OCC, which resulted in Flagstar's acquisition of NYCB 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

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55 *Id*. at 3-4.

56 Request for Comment on Proposed Statement of Policy on Bank Merger Transactions, *supra* note 3.

57 *See e.g.*, Ebrima Santos Sanneh, *supra* note 43.

its total assets to jump again, to $123 billion.[58] It simply should be a surprise to no one that the bank that ultimately resulted from these rapid fire mergers ended up in distress and caused systemic concerns less than a year.

Flagstar's well-publicized managerial and financial problems in 2024 demonstrate the continuing challenge it presents for the OCC 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. ***This Proposal's Appendix, which codifies many of the OCC's current practices, is simply not sufficient in its current form.***

IV. THE PROVISION OF INFORMATION IN THE PROPOSAL IS NOT A BURDEN FOR BANKS; INSTEAD, IT IS A COST OF DOING BUSINESS AND VITAL TO PROTECT FINANCIAL STABILITY AND CONSUMERS.

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.[59]

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 challenges at Flagstar after its crisis acquisition of Signature. 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 of the size that the OCC would oversee, are large and consequential transactions with 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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[58] *See* Better Markets, *supra* note 49 at 1.

[59] *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 OCC works to strengthen its merger guidelines.

Sincerely,

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