Americans for Financial Reform Education Fund

Jennifer M. Jones
Deputy Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Attention: Comments/Legal OES (RIN 3064-AG18)

November 23, 2026

Re: FDIC Notice of Proposed Rulemaking on Merger Transactions (RIN 3064-AG18)

Dear Deputy Executive Secretary Jones:

Americans for Financial Reform Education Fund opposes the Federal Deposit Insurance Corporation (FDIC) proposed rule on merger transactions and urges the FDIC to rescind and reissue the rule to meet the vital statutory goals of the Bank Merger Act.[1] The proposed rule turns the statute on its head. The statute directs federal banking regulators to carefully evaluate the potential harms and risks of proposed bank merger transactions and only approve mergers that deliver benefits to customers and communities. The proposed rule is designed to rubber stamp bank mergers after only the most cursory and largely performative consideration of the statutory criteria.

AFREF is a nonpartisan and nonprofit coalition founded by more than 200 civil rights, consumer, labor, investor, faith-based, and civic and community groups and is dedicated to advocating for policies that shape a financial sector that serves workers, communities and the real economy, and provides a foundation for advancing economic and racial justice. We are concerned about the damaging impacts of a highly consolidated financial system, including banks, on the economy, communities, consumers, and small businesses, and we are concerned that these impacts historically have disproportionately disadvantaged lower-income people and people of color, women, people with limited English proficiency as individuals as well as the communities where these people live.

The current bank merger review process has failed to protect the public and public interest from ever larger banks exercising market power to impose higher costs on consumers, reduce the volume or quality of banking services, nor has it prevented the biggest banks from becoming so large that they pose a risk to the entire financial system and real economy. Unfettered bank mergers contributed to the rise in megabanks and systemic fragility that led to the 2008 financial crisis.

The proposed rule undermines the statutory requirements under the Bank Merger Act to carefully consider and evaluate each proposed merger (Section I); it would short circuit merger application

[1] Federal Deposit Insurance Corporation (FDIC). Merger Transactions Notice of Proposed Rulemaking. 91 Fed. Reg. 182. September 22, 2026 at 60196 et seq.

consideration and accelerate and rubber stamp proposed mergers (Section II); it erodes the statutorily mandated careful consideration of the competition assessment in a way that all but guarantees merger approvals (Section III); it undermines the statutory requirement that mergers enhance the convenience and needs of customers and communities (Section IV); it weakens the consideration of the impact of bank mergers on financial stability (Section V); and it undermines the public's right to meaningfully participate in the merger application process (Section VI).

I. Proposed rule undermines the Bank Merger Act

The proposed rule's fundamental orientation is to accelerate the approval of bank mergers and not to carefully evaluate merger applications as required by statute. Because of the unique economic role of chartered banks, banking regulators must evaluate bank merger applications under the Bank Merger Act to prevent anticompetitive mergers as well to carefully assess whether the combination will satisfy the public interest. Banks play a critical function in the monetary system, in providing credit to households and businesses, and in providing a utility-like service to retail customers connecting households to the financial system. Federal banking laws recognize this uniqueness by chartering banking institutions, delineating permissible banking activities, supervising the safety and soundness of banks, and requiring banks to serve the credit needs of all communities, including lower-income areas and communities of color, under the Community Reinvestment Act.

Moreover, the federal government provides direct and implicit subsidies to chartered banks that justify increased merger scrutiny. Federal deposit insurance subsidizes the banking industry from the costs of risk-taking, stabilizes the banking industry, and provides confidence and a sense of security for depositors.[2] Merger-driven consolidation grants larger banks other financial subsidy benefits, such as paying less for funds.[3] Banks are able to borrow from the Federal Reserve at highly-discounted rates that can be at or below 1 percent that are far cheaper than the credit terms other firms can access and this borrowing also receives significant tax subsidies.[4]

Federal banking laws recognize the important public interest in seriously evaluating bank merger applications. The Bank Merger Act directs banking regulators to reject mergers that are anticompetitive or that fail to meet three critical considerations: serving the convenience and needs of the community, maintaining adequate managerial resources and future prospects, and preventing excessive risk to financial stability. The statute reads:

> In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, the convenience and needs of the community to be served, and the risk to the stability of the United States banking or financial system.[5]

The banking regulators must independently assess these three public interest considerations under the Bank Merger Act. The convenience and need consideration incorporates the provision of

[2] Ellis, Diane. FDIC. "Deposit Insurance Funding: Assuring Confidence." November 2013.
[3] Kim, JinAh and Katja Seim (Kim & Seim). University of Pennsylvania. Wharton School of Business. "Effects of Bank mergers on risk leading up to the 2007-2008 financial crisis." 2016 at 7.
[4] Admati, Anat and Martin Hellwig. *The Bankers' New Clothes: What's Wrong with Banking and What to Do About It*. Princeton University Press: Princeton, New Jersey. 2024 at 137 to 140.
[5] 12 USC §1828(c)(5)(B); 12 USC §1842(c)(2) and (7).

quality, affordable, and equitable banking services to consumers, lending records to lower-income and Black and Latine households and communities and other communities of color, and performance and prospective performance under the Community Reinvestment Act. The managerial resources and future prospects consideration encompasses compliance with supervisory regulations, including consumer protection and safety and soundness regulations. The future prospects element includes not only whether the applicants and combination would be well capitalized but also whether the combination can pose risks to the future viability of the merged institution. The financial stability consideration includes an evaluation of whether the merged bank poses a greater concentration of risk that could be transmitted to the banking or financial system in times of economic stress.

Banking regulators should reject proposed bank mergers that raise significant concerns under any of these considerations. Senator A. Willis Robertson (Virginia), Chairman of the Senate Committee on Banking and Currency and sponsor of the Bank Holding Company Act amendments that aligned its language with the Bank Merger Act, stated that regulators can approve merger applications that will enhance the public interest but that adverse findings on any of the constituent statutory considerations would provide ample authorization to deny bank mergers:

> Of course, if there are no substantial anticompetitive effects and no tendency to create a monopoly and no suggestion of restraint of trade, the banking agency will proceed to consider the merger on the basis of the financial and managerial resources and future prospects of the existing and proposed institutions and the convenience and needs of the community to be served. The banking agency may approve the merger if it thinks the merger will be beneficial from these points of view, or it can turn the merger down if it thinks the merger undesirable or objectionable in any respects from these points of view.[6]

The Congressional intent of the statutory considerations under the Bank Merger Act is for the banking agencies to consider each of the constituent elements—competition, convenience and needs, managerial resources and future prospects, and financial stability—independently and that the agencies should deny merger applications that fail "in any respects" to achieve these public interest objectives.

The proposed rule would undermine the purpose of the statute by focusing on swift approval of mergers rather than careful consideration of the potential negative impacts of mergers on customers, communities, and financial stability. The proposed rule does not acknowledge that some of the mergers that banking regulators have approved may have harmed consumers, communities, or the broader economy. The large number of large mergers that were approved between 1995 and 2005 indisputably concentrated financial risk into larger banks. Some of those institutions failed during the financial crisis and these failures reverberated across the economy and contributed to job losses, the erosion of household wealth, and over 10 million foreclosures which caused tremendous harm across the country and which disproportionately harmed Black and Latine families.

[6] Congressional Record. Vol. 112, Part 2. February 9, 1966 at 2656.

II. Proposed rule would short circuit evaluation and quickly rubber stamp bank mergers

The proposed rule aims to accelerate and simplify the merger approval process. Although it purports to be about the review of mergers, the structure and approach of the proposed rule make it clear that it is designed to rapidly rubber stamp bank mergers rather than provide the close scrutiny the Bank Merger Act intended. The proposal states that in many cases a merger "approval is routine and can be provided expeditiously" and that the proposed rule addresses "unnecessarily burdensome process with few additional public benefits."[7]

The implication is that an onerous bank merger review process is stifling corporate transactions and deterring mergers. The proposed rule even suggests—without any evidence—that paperwork application requirements may have dissuaded possible mergers and that replacing the current 12-page application with a letter could save banks $3,500 in filing costs.[8] This is truly a tiny paperwork burden and is unlikely to deter any mergers. The 13 smallest FDIC regulated banks have less than $20 million in assets, making the filing costs to take over even the very smallest banks would represent a mere 0.02 percent of the acquisition costs.

But the current merger review process is speedy and already almost all merger applications get approved, undermining the contention that prospective merging banks face significant barriers. From 2016 to 2025, the FDIC approved 92.3 percent of all bank merger applications.[9] The vast majority were approved rapidly—more than half (52 percent) were approved within two months, nearly three-quarters (73 percent) were approved within three months, and less than 7 percent took more than six months to approve. Although the FDIC notes in the proposed rule that "the FDIC would retain discretion to deny a merger filing,"[10] over the past decade, the FDIC has not denied a single bank merger application.[11]

The proposed rule creates a new subclass of *de minimis* mergers that would be entitled to special rapid processing and presumptive approval as well as updating the expedited class of merger reviews. Even for larger mergers that do not qualify for these accelerated timetables, the review of weakened considerations under the proposed rule would nonetheless all but guarantee fast approval.[12] The accelerated merger approval process focuses on speedy and presumptive approval, in clear violation of the statutory requirement to consider each merger on its merits and to evaluate each of the statutory requirements, including specifically evaluating the impact on consolidated banking markets, the convenience and needs of customers and communities, and on financial stability.

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[7] 91 Fed. Reg. 182 at 60196 and 60917.
[8] 91 Fed. Reg. 182 at 60223.
[9] AFREF analysis of regular bank merger applications. FDIC. Bank Application Actions. October 1, 2016, through September 30, 2026. Excludes corporate reorganizations, interim mergers, and pending actions. Accessed November 2026.
[10] 91 Fed. Reg. 182 at 60214.
[11] AFREF analysis of FDIC Bank Application Actions.
[12] Standard mergers below $50 billion in assets that did not qualify for *de minimis* or expedited review would be considered within 90-days with one 90-day extension and mergers over $50 billion in assets would be considered within 150-days with one 120-day extension. Proposed 12 CFR §303.64(f)(1) and (2) and §303.64(g). 91 Fed. Reg. 182 at 60231.

Proposed rule creates new class of de minimis mergers with rapid, presumptive approval: The proposed rule creates a brand new *de minimis* category of bank mergers that would receive hyper-fast review and "routine, nearly automated approval"[13] These mergers would "qualify for rapid processing with deemed approval" as long as the acquired assets fell below the $133.9 million Hart-Scott-Rodino Act threshold and the target has 5 percent of the assets of the acquirer.[14] The FDIC contends that these mergers can receive more expedited review because they "typically garner little to no meaningful public interest"[15] and because their smaller size automatically "satisfy the statutory [competition and financial stability] factors."[16]

To qualify for *de minimis* expedited review, the merging banks must receive the top three safety and soundness and compliance ratings, a satisfactory or outstanding Community Reinvestment Act (CRA) rating, be well-capitalized, and not be subject to regulatory orders.[17] The FDIC contends that these factors justify more rapid consideration, but it includes banks with deficient compliance ratings, lower safety and soundness ratings, and excludes almost no banks because of massive grade inflation on CRA ratings (see Section IV).[18] Complete *de minimis* applications will be "deemed approved" within 5 days of receipt of a complete filing or 5 days after the justice department submits a competitive factors report.[19] This short timeframe is entirely insufficient to evaluate the impact of bank mergers and their compliance with the statutory requirements under the Bank Merger Act.

This size threshold is very broad and would facilitate a wave of smaller bank acquisitions with little or no scrutiny by the FDIC. There are nearly 540 FDIC regulated banks with less than $133.9 million in assets that could be acquired by the 225 FDIC regulated banks with over $2.5 billion in assets and meet the *de minimis* size thresholds.[20] Moreover, the proposed rule would encourage larger banks to grow through a series of bank acquisitions below the *de minimis* size threshold—that would get no antitrust review because it would be under the Hart-Scott-Rodino threshold and 5-day review and presumptive approval by the FDIC. The Department of Justice and Federal Trade Commission merger guidelines recognize that the cumulative effect of serial acquisitions can create larger firms that can exert unlawful monopolistic market power that violate the Clayton Act.[21]

This automated *de minimis* presumptive approval violates the Bank Merger Act's requirement that every proposed merger must be specifically evaluated to determine whether it enhances the public interest. The FDIC lacks the statutory authority to grant categorical presumptive approval of

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[13] 91 Fed. Reg. 182 at 60207.
[14] Proposed 12 CFR §303.61(c)(1)(i). 91 Fed. Reg. 182 at 60228 and 60198; Federal Trade Commission. [Press release]. "New HSR thresholds and filing fees for 2026." January 20, 2026.
[15] 91 Fed. Reg. 182 at 60197.
[16] 91 Fed. Reg. 182 at 60207; the proposed rule would remove *de minimis* consideration if the Department of Justice issued a negative competitive factors report, but the merger would still be eligible for expedited consideration. 91 Fed. Reg. 182 at 60199 and 60207.
[17] Proposed 12 CFR §303.61(c)(1)(2). 91 Fed. Reg. 182 at 60228 to 60229.
[18] The current regulations only allow expedited merger consideration on a longer timeline for banks with a composite rating of 1 or 2 under the Uniform Financial Institutions Rating System. 12 CFR §303.64(a) and 12 CFR §303.2(r).
[19] Proposed 12 CFR §303.64(c)(1). 91 Fed. Reg. 182 at 60230
[20] FDIC. BankFind Suite. Financial/Regulatory Search. FDIC Primary Regulator; Maximum Assets $133.9 million and Minimum Assets of $2.6 billion. Reporting period June 30, 2026. Accessed November 2026.
[21] U.S. Department of Justice and Federal Trade Commission (DOJ & FTC). Merger Guidelines. December 18, 2023 at 23.

mergers based on their size, performance on regulatory ratings systems, or level of capital and must rescind the *de minimis* definition and consideration.

Proposed rule expands expedited evaluation and approval and makes it harder for the public to engage: The proposed rule would allow larger mergers to be considered under expedited, 45-day consideration and approval. [22] More than one-third (34.6 percent) of FDIC merger approvals already occur within 45-days.[23] The current regulations limit expedited merger review to transactions where the target bank is under 10 percent of the assets of the acquiring bank.[24] The proposed rule would allow expedited review for mergers that were two and a half times bigger, with the target banks assets up to 25 percent of acquirer bank's assets.[25] Mergers like these, where the acquired bank is a greater share of the acquiring bank, are more complex and difficult to complete and should not receive expedited consideration.

The proposed rule would also significantly erode the ability of the public to intervene in expedited merger applications (see Section VI). Currently, the FDIC can remove proposed transactions from expedited review if it receives adverse comments or CRA protests that warrant investigation.[26] The proposed rule would erode this public participation. The proposal notes that "adverse comments and CRA protests typically do not warrant extensive additional investigation or review."[27] The proposed rule would constrain the FDIC from removing expedited review unless the CRA, supervisory, or legal "allegations were sufficiently severe."[28] The proposed rule explicitly states that adverse comments or CRA protests "shall not automatically remove a filing from expedited processing" and the "removal of a filing from expedited processing to be rare."[29] This would create a higher barrier for public concerns over the impact of a proposed bank merger to even extend the merger review evaluation.

III. Proposed rule erodes careful consideration of the competition assessment in a manner that all but guarantees merger approvals

The proposed rule would significantly undermine the antitrust evaluation of prospective mergers, making it far more difficult to reject bank mergers on competition grounds. The proposed rule dilutes measurements of market concentration both by expanding the products included in the calculation (adding credit unions and centrally booked deposits) and by relying on overly broad geographic markets. Additionally, it creates a safe harbor exemption to prohibit the consideration of competition for some smaller mergers as well as encouraging the dismissal of concentration concerns even for mergers that exceed the concentration thresholds under the 1995 bank merger

[22] The merger should be considered within 45-days, 10 days after public notice notification requirement, 5 days after competitive factors report is delivered. Proposed 12 CFR §303.64(e)(2). 91 Fed. Reg. 182 at 60231.
[23] AFREF analysis of regular bank merger applications. FDIC. Bank Application Actions. October 1, 2016 through September 30, 2026. Excludes corporate reorganizations, interim mergers, and pending actions. More than half the bank merger applications that the FDIC returned for incompleteness were returned within 45-days. Accessed November 2026.
[24] 12 CFR 303.64(a)(4)(ii)(B).
[25] Proposed 12 CFR §303.64(e)(3). 91 Fed. Reg. 182 at 60231
[26] 12 CFR 303.11(c)(2).
[27] 91 Fed. Reg. 182 at 60207.
[28] *Ibid.*
[29] Proposed 12 CFR §303.11(c)(5). 91 Fed. Reg. 182 at 60228.

guidelines.[30] The combination of these elements would substantially would make it far less likely that proposed mergers would be judged to increase market concentration sufficiently to raise competition concerns and would make it considerably harder to deny proposed mergers.

Federal antitrust law forbids mergers that increase, extend, or entrench market power and erode the competition that can lower prices, improve quality, and expand choice. The Clayton Antitrust Act prohibits mergers "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[31] The Bank Merger Act mirrors the Clayton Act language and prohibits bank mergers whose result "may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade."[32]

It is particularly critical to guard against consolidation in the banking sector and prevent anticompetitive bank mergers. The intent of the antitrust laws including the Clayton Act and Bank Merger Act was not solely to prevent narrow concentrations in local banking markets, but to prevent the concentration of economic power that could undermine shared prosperity and democracy. As the Supreme Court wrote in U.S. v. Philadelphia National Bank "if the businessman is denied credit because his banking alternatives have been eliminated by mergers, the whole edifice of an entrepreneurial system is threatened; if the costs of banking services and credit are allowed to become excessive by the absence of competitive pressures, virtually all costs, in our credit economy, will be affected."[33] The proposed rule would encourage more mergers, especially serial or multiple smaller mergers with presumptive and rapid approval under the new *de minimis* merger evaluation that would allow acquiring banks to amass entrenched market power that would harm customers and communities.

The proposed rule deceptively suggests that the banking market has "become far more competitive in the decades since the Bank Merger Act was enacted" because of the elimination of barriers to interstate banking, increased "bank-like products" offered by non-banks, and financial technology firms and products that offer some financial products.[34] The 1990s banking deregulation encouraged and facilitated the wave of banking mergers that have consolidated today's financial industry, reduced regulatory oversight, and posed increasing risk to the financial system.

This deregulation helped drive what the Federal Reserve Bank of Chicago called an "unprecedented pace of bank mergers" in the 1990s with an average of over 500 acquisitions a year between 1990 and 1998.[35] The 2008 financial crisis further significantly reduced the number of U.S. banks. Several

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[30] The proposed rule codifies in regulations the outdated 1995 bank merger guidelines that set a concentration threshold of 1,800 Herfindahl-Hirschman Index (HHI) points or change in HHI greater than 200 points. HHI is the sum of the squares of the market shares of all participants in product market, which is bank deposits under the 1995 guidelines. U.S. Department of Justice (DOJ). Bank Merger Competitive Review 1995. Updated September 2000 at 1; Further, federal banking law prohibits mergers that would create a bank that controlled 10 percent of total national deposits or 30 percent of any state total deposits and some states have lower deposit concentration limits. 12 USC §1831u(b)(2); Wheelock, David. Federal Reserve Bank of St. Louis. "Banking industry consolidation and market structure: Impact of the financial crisis and recession." *Federal Reserve Bank of St. Louis Review*. November/December 2011 at 420.

[31] 15 USC §18.

[32] The language mirrors the Clayton Act and includes restraint of trade. 12 USC §1828(c)(5)(B).

[33] U.S. v. Philadelphia Nat. Bank. (U.S. v. PNB). 374 U.S. 321 (1963) at note 41 at 372.

[34] 91 Fed. Reg. 182 at 60196.

[35] Brewer, Elijah III et al. Federal Reserve Bank of Chicago. "The price of bank mergers in the 1990s." *Economic Perspectives*. Vol. 24, Iss. 1. February 2000 at 2.

banks and financial firms collapsed and were absorbed into other giant banks, like Washington Mutual, Wachovia, Countrywide Financial, and Bear Stearns.[36] The number of U.S. banks declined by 12 percent between the beginning of 2007 and the end of 2010.[37] Banking mergers have substantially increased consolidation nationally and in local markets. The national deposit share of the top four banks nearly quadrupled from 1995 to 2020 from under 10 percent in 1995 to 34.9 percent in 2025.[38] Many major metropolitan areas already exceed the merger review consideration concentration thresholds of 1,800 a Herfindahl-Hirschman Index including greater Dallas, San Francisco, and Minneapolis, Philadelphia, and San Francisco (1,939, 2,297, and 2,431, respectively).[39] The market concentration in cities and other smaller geographic areas can be far higher. For example, in the cities of Detroit and Charlotte the HHI is already more than double the thresholds (4,736 and 5,534, respectively). This rising level of banking concentration has harmed customers and communities.[40]

A. Merger-driven bank consolidation has harmed customers, small businesses, and communities

The rising level of bank concentration has increased the cost, lowered service and product quality, and lowered the availability of banking services. This has made bank accounts more expensive for customers, made it harder and more expensive to access suitable mortgage credit, and eroded access to small business loans. These impacts undermine household economic security and drain economic resources from communities and they are especially damaging for lower-income people and people of color and the communities where they live.

Merger-driven concentration raises bank fees and lowers interest rates: Bank mergers have driven higher bank fees and higher costs to maintain accounts, which has an especially disadvantageous impact on lower-income households. Larger banks generally have higher bank fees and higher minimum balance requirements that make it harder for lower-income households to get or maintain an account.[41] A 2005 Federal Reserve Board study found that bank fees were higher in more concentrated markets and that banks operating in multiple markets charged substantially higher fees than banks operating in only one market.[42] A 2018 Harvard study found that lower-income neighborhoods that had branches taken over in mergers had higher levels of depositor flight, an inflow of check cashing outlets, and when these areas experienced subsequent financial shocks, there was an uptick in debt collection activity and evictions.[43] Big banks not only charge higher fees, but bank consolidation also results in lower interest payments to customer. The majority of literature

[36] "Timeline: Key events in financial crisis." *USA Today*. September 9, 2013.
[37] Wheelock. 2011 at 419.
[38] AFREF analysis of FDIC. BankFind Suite: Summary of Deposits—Market Share Reports. Accessed November 2026.
[39] Federal Reserve Bank of St. Louis. Competitive Analysis and Structure Source Instrument for Depository Institutions (CASSIDI). Weighted deposits for Dallas, Minneapolis-St. Paul, and San Francisco-Oakland-San Jose. Accessed November 2026.
[40] AFREF analysis of FDIC. BankFind Suite: Summary of Deposits—Market Share Reports. Accessed November 2026.
[41] Bord, Vitay M (Bord). Harvard University. "Bank Consolidation and Financial Inclusion: The Adverse Effects of Bank Mergers on Depositors." December 1, 2018 at 8.
[42] Hannan, Timothy H. Federal Reserve Board. "Retail Deposit Fees and Multimarket Banking." Staff Paper 2005-65. December 2005 at 27.
[43] *Ibid.* at 22, 24, and 30.

has found that increased bank concentration significantly lowers the interest rates paid to depositors even when controlling for purported increases in efficiency or scale from mergers.[44]

These growing fees make having a bank account more costly, which is especially burdensome on lower-income households. The acquisition of smaller, community banks by larger banks can raise the costs of maintaining depository accounts and cause lower-income depositors to exit the banking system and become unbanked, compromising their ability to save to withstand household financial emergencies.[45] High bank account fees and high minimum balance requirements were primary reasons unbanked households did not have a bank account according to the FDIC.[46] People of color are substantially more likely to be unbanked. Black households were five times more likely than white households to be unbanked and Latine households were nearly five times more likely to be unbanked (10.6 percent, 1.9 percent, and 9.5 percent, respectively).[47]

Merger-driven consolidation reduces the availability of affordable and suitable mortgage credit: Bank mergers and bank consolidation also make it harder for people to secure affordable and suitable credit and people and communities of color have been disproportionately disadvantaged by bank consolidation. Merging banks reduce the volume, increase the cost, and lower the access to affordable mortgage credit and these detrimental effects are more pronounced for people of color, lower-income people, lower-income areas, and communities of color. Merging banks tend to reduce their mortgage lending after completing a deal and the decline in mortgage lending is more pronounced to Black borrowers.[48] A 2020 study found that while merging banks made more loans to prime borrowers, they curtailed lending to subprime borrowers after the merger.[49] A 2020 study by Louisiana State University and Houston University researchers found that merging banks increased the interest rates they charged to home mortgage borrowers.[50] A 2013 Harvard study found that counties with higher concentration levels had 35 percent less refinance activity because these markets offered less attractive refinance rates, it also found that those who did refinance paid more for these loans.[51]

Bank consolidation has an especially negative impact on people of color and lower-income people who face reduced access to credit and more expensive terms. One study found that Black mortgage applicants are less likely to get mortgages in counties where bank mergers occur and that divestitures from mergers exacerbate racial mortgage disparities.[52] Another study found that banks that have

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[44] Carletti, Elena, Philipp Hartmann, and Giancarlo Spagnolo (Carletti, Hartmann & Spagnolo). "Implications of the bank merger wave for competition and stability." *Risk Measurement and Systemic Risk, Proceedings of the Third Joint Central Bank Research Conference*. January 2002 at 42; Weinberg, Matthew (Weinberg). University of Georgia, Center for Economic Policy Studies. "The Price Effects of Horizontal Merges: A Survey." CEPS Working Paper No. 140. January 2007 at 5.
[45] Bord. 2018 at 1.
[46] FDIC. "2023 FDIC National Survey of Unbanked and Underbanked Households." November 2024 at 3.
[47] *Ibid.* at 2.
[48] Gam, Yong Kyu and Yunqi Zhang (Gam & Zhang). Southwestern University of Finance and Economics and Nankai University. "Dismembered Giants: Bank Divestitures, Local Lending, and Housing Markets." 55th American Real Estate and Urban Economics Association. San Diego. January 3-5, 2019 at 4 and 41.
[49] Ratnadiwakara, Dimuthu and Vijay Yerramilli (Ratnadiwakara & Yerramilli). Louisiana State University and University of Houston. "Effect of Bank Mergers on the Price and Availability of Mortgage Credit." September 2020 at 21.
[50] *Ibid.* at 3 and 18 to 19.
[51] Scharfstein, David and Adi Sunderam (Scharfstein & Sunderam). Harvard University and National Bureau of Economic Research. "Concentration in Mortgage Lending, Refinancing Activity, and Mortgage Rates." NBER Working Paper No. 19156. June 2013 at 3.
[52] Gam & Zhang. 2019 at 6 and 8.

merged increase the approvals of conventional mortgages generally, but not to Black, Latine, and lower-income mortgage applicants.[53] The study also found that merging banks reduced the approval of FHA loans and increased the rejection of FHA applications by Black, Latinx, and lower-income applicants.[54] The reduction of FHA credit especially damages families of color and lower-income families since FHA has been a substantial and often primary source of mortgage credit for lower-income households and borrowers of color.[55]

Merger-driven consolidation reduces small business lending: Bank consolidation can also reduce small business lending and have a disproportionate impact on the ability of businesses owned by people of color and women as well as very small businesses to access credit. Mergers between larger banks that create more concentrated markets reduce small business credit access, especially for more marginal firms, and leave fewer credit alternatives in local markets as mergers reduce the number of banks.[56] Studies have found that small businesses pay higher interest rates in more concentrated banking markets.[57] A 2014 Massachusetts Institute of Technology paper found that large bank merger-driven branch closures reduced small business lending for several years and that the decline was concentrated in lower-income areas and communities of color.[58] A preliminary 2019 paper found that counties with more acquisitions of smaller banks by larger banks and more takeovers by out-of-state banks had a decline in small business lending.[59] A 2003 FDIC working paper found that merging banks had much lower small business loan growth than non-merging banks and that when mergers increased local market concentration there was significantly lower small business lending growth especially in urban areas.[60]

B. Proposed rule would dilute concentration metrics, effectively waiving concentration test for almost all proposed mergers

The proposed rule substantially weakens the competition evaluation of prospective mergers by artificially diluting the measurement of market concentration, requiring the consideration of an overly broad geographic market, establishing a safe harbor that would rubber stamp mergers in less concentrated markets, and allows the FDIC to ignore concentration concerns even when they are visible under these weakened evaluations. The proposed rule is designed to rubber stamp bank mergers by weakening the concentration assessment and making it significantly more difficult to raise competition concerns that should deny proposed mergers or require the divestiture of banks in concentrated markets as a condition of merger approval.

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[53] Ratnadiwakara & Yerramilli. 2020 at 4.
[54] Samolyk, Katherine and Christopher A. Richardson (Samolyk & Richardson). FDIC. Working Paper 2003-02. "Bank consolidation and small business lending within local markets." April 2003 at 7.
[55] Bhutta, Neil and Aurel Hizmo. Board of Governors Federal Reserve. "Do Minorities Pay More for Mortgages?" Working Paper No. 2020-007. 2020 at 2.
[56] Samolyk & Richardson. 2003 at 9.
[57] Carletti, Hartmann, & Spagnolo. 2002 at 40.
[58] Nguyen, Hoai-Luu (Nguyen). Massachusetts Institute of Technology. "Do Bank Branches Still Matter? The Effect of Closing on Local Economic Outcomes." December 2014 at 3.
[59] Minton, Bernadette A., Alvaro G. Taboada, and Rohan Williamson (Minton, Taboada & Williamson). Ohio State University, Mississippi State University, and Georgetown University. "Bank Mergers and Small Business Lending: Implications for Community Development." Paper presented at Financial Management Association 2019 Conference, New Orleans. October 23 to 26 at 14.
[60] Samolyk & Richardson. 2003 at 23.

Proposed rule inappropriately includes credit unions and centrally booked deposits: The proposed rule would add non-bank deposits into the bank deposit market, artificially reducing the measurements of concentration by adding non-substitute products. The proposed rule concedes that FDIC's approach "would have the effect of reducing concentration in a relevant geographic market because it incorporates additional categories of deposits."[61] This would make it less likely that any merger would surpass the concentration thresholds that would allow the FDIC to deny merger applications. Moreover, the proposed rule inappropriately suggests further expanding the market definition to include financial technology firms that do not necessarily provide the same range or level of service that brick-and-mortar depository institutions offer.

Bank deposits are the appropriate product to measure market concentration. Most banking services are tied to their local geographies; most people have bank accounts near their homes, jobs, or schools. Depository banks are still preferred by customers and two-thirds of people use traditional banks the most for their financial services needs according to a 2025 YouGov survey, drawn by the physical location of their branches and ATM networks, preference for in-person banking, trust, and security.[62] But depositors are practically captive consumers of banks, making it difficult to avoid higher fees. Many markets are overwhelmingly dominated by a few big banks, making it harder to find alternatives. And customers bear significant costs to switch to other banks to close and open accounts and change banking relationships like direct deposits, automated bill payments, and other automated banking transactions. Most people have maintained their bank accounts for almost two decades and more than two-thirds (71 percent) of bank customers did not change banks because it would be burdensome to move to a new bank.[63]

The proposed rule distorts the bank market definition by adding credit unions and centrally booked deposits.[64] For credit unions, the proposal would add all deposits at credit unions completely within the relevant geographic market and a representative share of the credit union membership equally allocated to branches within the geographic market.[65] Although federal law and credit union chartering rules have expanded over the past decades, the field-of-membership remains constrained and is not open to any potential customer.[66] Credit union membership remains largely exclusive to people based on where they work, reside, worship, or study and although some federal credit unions allow anyone to join, it typically involves donating to a partner non-profit organization.[67] These limitations make the inclusion of credit union deposits to the market definition entirely inappropriate because the accounts are not genuine product substitutes for people.

The proposed rule also would include a representative portion of centrally booked deposits at banks that hold the majority of their deposits at headquarters.[68] This would include adding a subset of *all* centrally booked deposits in the country including for banks without branches in the relevant

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[61] 91 Fed. Reg. 182 at 60216.
[62] Shah, Kineree. YouGov. "Why Americans prefer traditional banks." June 18, 2025.
[63] Bennett, Karen and Marc Wojno. "Survey: Many consumers stick with bank accounts for decades, cite convenience as a factor." *Bankrate*. March 10, 2025; First Tech Federal Credit Union. "Primary Financial Institution Survey." September 2023.
[64] Proposed 12 CFR §333.5(c)(2). 91 Fed. Reg. 182 at 60234.
[65] Proposed 12 CFR §333.5(c)(2)(ii). 91 Fed. Reg. 182 at 60234; 91 Fed. Reg. 182 at 60216.
[66] National Credit Union Administration. [Press release]. "Modern field-of-membership rule improves consumer access to affordable credit." October 27, 2016.
[67] Oliveira, Sebastian and Mark Evitt. "8 credit unions anyone can join." *U.S. News and World Report*. July 14, 2026.
[68] Proposed 12 CFR §333.5(c)(2)(iv). 91 Fed. Reg. 182 at 60234

geographic market by presuming the distribution of centrally booked deposits mirrors the population distribution.[69] The FDIC acknowledges that this approach will overestimate deposits for nationwide banks with few branches,[70] and effectively artificially reduce concentration levels. There is no evidence that these centrally booked deposits actually are proportionately distributed across the country, making it entirely inappropriate to automatically include them in the product-market concentration assessment.

Finally, the proposed rule asks whether the FDIC should further erode the product-market definition by including financial technology firms that hold their customers' funds at custodial accounts in depository institutions.[71] It would be nearly impossible to attribute the geographic distribution of fintech companies, either for online transaction accounts or online fintech lenders. Including these fintech companies in the competitive analysis of proposed mergers would diminish bank market concentration when that does not reflect the reality of markets that consumers encounter.[72] Additionally, fintech accounts are imperfect substitutes for chartered depository institutions as these accounts do not offer the suite of products and services offered by banks and are not always governed by the custodial protections of an individual bank deposit. These fintech products are not perfect substitutes for banking services, the FDIC must not include these accounts from the competitive analysis for a potential merger.

Proposed rule would rely on inappropriately broad geographic markets that would dilute market concentration: The proposed rule would use broad geographic market definitions that would artificially dilute the market concentration of FDIC institutions. The proposal would use the Federal Reserve Bank of St. Louis' Competitive Analysis and Structure Source Instrument (CASSIDI) to define the relevant geographic market for merging FDIC institutions.[73]

These markets can be extremely large and encompass the entirety of metropolitan statistical areas. Although the CASSIDI system includes individual non-metropolitan area counties, it does not delineate submarkets within larger metropolitan areas. The Department of Justice and Federal Trade Commission merger guidelines that implement the Clayton Act define the relevant geographic market as "a region encompassing a group of customers" and is constrained by "the limits that distance puts on some customers' willingness or ability to substitute."[74]

These markets may be appropriate for national banks or bank holding companies but are rarely appropriate for the smaller institutions regulated by the FDIC. For example, the CASSIDI system defines the Washington, DC banking market as the District of Columbia, 5 full and 2 partial counties in Maryland, 9 counties and 5 cities in Virginian, and one county in West Virginia.[75] There are two FDIC regulated institutions in each of West Virginia and the District of Columbia. These banks largely compete for customers in their respective locations, not throughout the 16 counties in the metropolitan area.

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[69] 91 Fed. Reg. 182 at 60216.
[70] *Ibid.*
[71] *Ibid.* at 60215.
[72] Kress, Jeremy C (Kress). "Modernizing bank merger review." *Yale Journal on Regulation*. Vol. 37, No. 435. 2020 at 439.
[73] Proposed 12 CFR §303.61(l). 91 Fed. Reg. 182 at 60229; 91 Fed. Reg. 182 at 60215.
[74] DOJ & FTC. 2023 at 4.3.D.2. and 4.3.D.2.b at 45 to 46.
[75] Federal Reserve Bank of St. Louis. CASSIDI. Richmond District. Washington, DC. Accessed November 2026.

Using the Federal Reserve geographic market definition would substantially dilute market concentration measures for these smaller markets. There is moderate market concentration for bank deposits in the entire Washington, DC metropolitan area (with an HHI under 1,100).[76] If the FDIC considered a merger between Potomac Bank and Jefferson Security Bank in Jefferson County, West Virginia, their combined 0.34 percent of the metropolitan area market would not raise any competition concerns. But these two banks are the two largest in Jefferson County, which is already highly concentrated (with an HHI over 2,100) and the combined bank would have a 54 percent market share of county deposits, raising the HHI by 1,400 to over 3,500.[77]

The proposed rule would effectively dilute measured market concentration levels for mergers between smaller banks in larger metropolitan areas. In many cases, the metropolitan areas in the CASSIDI system will be the appropriate market, but predetermining a geographic market definition without knowing which banks are merging undermines the evaluation of the product-market concentration. The FDIC should evaluate the unique geographic market for each proposed merger instead of establishing predetermined markets before mergers are even proposed.

Proposed rule bars denying anticompetitive mergers under diluted market concentration assessments; allows approval of mergers that exceed concentration thresholds: The proposed rule establishes a safe harbor that prevents the FDIC from denying mergers that fall below the concentration thresholds assessed under the proposed rule's diluted product-market definitions. Moreover, the rule allows the FDIC to ignore the concentration test even when the proposed merger exceeds the concentration thresholds under the distorted and artificially suppressed concentration metrics.

The proposed rule prohibits the FDIC from denying mergers on competition grounds that result in an HHI below 1,800 points or that exceed 1,800 points but create an increase below 200 points.[78] The 200-point increase is double what the current merger guidelines flag as presumptively unlawful under the Clayton Act. The 2023 FTC and Department of Justice merger guidelines state that an HHI increase of over 100 points "is a significant increase" and is "presumed to substantially lessen competition or tend to create a monopoly."[79] Moreover, the 1995 bank merger guidelines, which are still in effect, recognize that even mergers that fall below the thresholds (1,800 and 200 point increase) may nonetheless present anticompetitive combinations, and that the initial screen may "not reflect fully the competitive effects of the transaction in all relevant markets, in particular lending to small and medium-sized businesses."[80] The proposed rule's prohibition on further consideration of mergers that fall below the 1995 bank merger thresholds—especially given how the proposed rule dilutes measurements of concentration—undermines the Bank Merger Act requirements to evaluate the impact of bank mergers on competitive markets.

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[76] Federal Reserve Bank of St. Louis. CASSIDI. Weighted deposits for Washington, DC metropolitan area. Accessed November 2026.
[77] AFREF analysis of FDIC. BankFind Suite: Summary of Deposits—Market Share Reports. Accessed November 2026.
[78] Proposed 12 CFR §333.5(c)(3). 91 Fed. Reg. 182 at 60234. This safe harbor would not apply if the Department of Justice objected to the merger in its competitive factors report. The FDIC can nonetheless approve mergers that the Department of Justice object to, but the proposed rule would not allow the FDIC to automatically determine there were no competitive harms.
[79] DOJ & FTC. 2023 at 5.
[80] DOJ. 2000.

Additionally, the proposed rule provides an escape hatch that affirmatively allows the FDIC to even approve mergers that exceed the concentration thresholds. The FDIC is precluded from exercising any judgment if the proposed merger does not exceed the thresholds, but required to reconsider the competitive effects if the proposed merger exceeds the thresholds for anticompetitive mergers. The proposed rule notes that even when the proposed merger is anticompetitive under the HHI thresholds, the FDIC "shall consider other factors related to the impact of the transaction on competition," including "any procompetitive effects of the merger transaction, including those that are in the public interest"[81]

The current evaluation of proposed bank mergers is already overly sympathetic to the purported efficiency gains and cost savings that larger scale could deliver to consumers.[82] This proposal goes further in ways that are not consistent with the statute, which only allows reconsideration of "anticompetitive effects of the proposed transaction [that] are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served,"[83] not the qualitative consideration of allegedly pro-competitive effects. The FDIC does not have statutory authority to grant approvals to anticompetitive mergers based on purported procompetitive effects of the merger.

IV. Proposed rule undermines the statutory requirement that bank mergers expand the convenience and needs of communities

The proposed rule weakens the consideration of the statutory requirement that banking regulators reject proposed mergers that do not enhance the convenience and needs of customers and communities. The Bank Merger Act requires the FDIC to consider "in every case […] the convenience and needs of the community."[84] But the proposed rule would effectively waive the assessment of a merger's fulfillment of the convenience and convenience and needs tests for banks with satisfactory or outstanding Community Reinvestment Act ratings (which is almost all banks because of persistent CRA grade inflation) and for banks with less than stellar consumer compliance ratings. Further, even for banks that fail to meet these safe harbors, the proposed rule allows that the FDIC may approve mergers even for low performing banks that would almost certainly undermine the convenience and needs of communities and customers.

Banks are institutions deeply rooted in the economic fabric of communities and the banking regulators should make a meaningful assessment of the merging parties past records and prospective plans to meet the convenience and needs of communities and customers. Congress intended the evaluation of the convenience and needs consideration to assess whether the merger would enhance the quality of banking services offered to consumers and communities, not merely continue the banks' current business-as-usual practices. Representative Thomas Ashley stated that proposed bank mergers "must be shown to be sufficiently beneficial in meeting the convenience and needs of the community to be served that, on balance, it may properly be regarded as in the public interest."[85]

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[81] Proposed 12 CFR §333.5(c)(4). 91 Fed. Reg. 182 at 60234.
[82] Kress. 2020 at 441.
[83] 12 USC 1828(c)(5)(B).
[84] *Ibid.*
[85] United States v. Third Nat'l Bank in Nashville. 390 U.S. 171, 184 (1968).

The past two decades of merger-driven banking consolidation has created larger institutions that have enhanced and entrenched market power that has allowed banks to exercise their market power over consumers, customers, and communities by raising prices and or reducing the quality or range of services. Banks with greater market shares and market power have greater ability to raise prices and to erode the quality or range of services.

Bank mergers have driven higher bank fees and higher costs to maintain accounts, which has an especially harmful impact on lower-income households.[86] Merging banks reduce the volume, increase the cost, and lower the access to affordable mortgage credit and these detrimental effects are more pronounced for families of color, lower-income families, lower-income areas, and communities of color.[87] Bank consolidation can reduce small business lending and have a disproportionately negative impact on the ability of businesses owned by people of color and women as well as all very small businesses to access credit.[88]

The FDIC should be especially skeptical of proposed mergers involving banks subject to enforcement actions or with large numbers of consumer complaints at the Federal Trade Commission (FTC) and Consumer Financial Protection Bureau (CFPB); banks that have a record of harming, disadvantaging, or defrauding consumers or violating fair lending, fair housing, and fair credit laws should not be rewarded with merger approvals. The FDIC should coordinate with the FTC and the CFPB to review the consumer protection and fair lending record of proposed merging banks, the cost structure and availability of account and loan products, the performance serving lower-income applicants and applicants of color in providing mortgage, small business, and other loan products.

The banking regulators have not given the convenience and needs test the consideration and weight that it deserves and the proposed rule would encourage an even more cursory evaluation of a merger's effects on the convenience and needs of communities and customers.

Proposed rule would use overinflated CRA ratings as critical proxy for convenience and needs test: The proposed rule would lock-in the overemphasis on satisfactory or outstanding Community Reinvestment Act ratings as a key factor in meeting the convenience and needs test. The FDIC proposal states that there is a "high probability the FDIC would find favorably on the convenience and needs statutory factor" for banks with satisfactory or outstanding CRA ratings. [89] It has been a longstanding—and misguided—practice for regulators to primarily consider the CRA performance ratings.[90] CRA ratings are a poor metric for the convenience and needs consideration because considerable grade inflation grants nearly all banks "satisfactory" or "outstanding ratings." Between 2016 and 2025, the FDIC awarded 97.7 percent of banks a satisfactory or outstanding CRA rating.[91] The proposed rule would effectively eliminate the convenience and needs test and accelerate

[86] Bord. 2018; Kahn, Charles, George Pennacchi, and Ben Spranzetti. "Bank consolidation and the dynamics of consumer loan interest rates." *Journal of Business*. Vol. 78, No. 1. 2005; Carletti, Hartmann & Spagnolo. 2002; Weinberg. 2007.
[87] Ratnadiwakara & Yerramilli. 2020; Gam & Zhang. 2019; Scharfstein & Sunderam. 2013.
[88] Samolyk & Richardson. 2003; Carletti, Hartmann & Spagnolo. 2002; Nguyen. 2014; Minton, Taboada & Williamson. 2019.
[89] 91 Fed. Reg. 182 at 60220.
[90] 12 USC §1828(c)(5)(B); FDIC. Application and Procedures Manual. November 13, 2026 at 4–21.
[91] AFREF analysis of FDIC CRA ratings from 2016 to 2026. Data from Federal Financial Institution Examination Council. "FFIEC Interagency CRA Rating Search." Accessed November 2026; this CRA grade inflation also occurs at other agencies. Previously, AFREF found that 98 percent of banks regulated by the Office of the Comptroller of the

merger approval for effectively all banks because almost all of them receive the top half of CRA ratings. The FDIC should require merging parties to undergo new fair lending and CRA reviews under heightened scrutiny to more fully examine the banks' records.

Proposed rule totally omits civil rights and fair lending considerations: The proposed rule does not include civil rights or fair lending considerations in the convenience and needs test. Compliance with the Equal Credit Opportunity Act and fair lending laws are critical elements of fully serving the convenience and needs of customers and communities. The FDIC's enforcement of these core civil rights laws has been declining. The number of fair lending referrals to the Department of Justice has fallen from 12 in 2022 to zero in 2025.[92] Over those four years, the FDIC made a total of 22 fair lending referrals, representing only 0.8 percent of the more than 2,700 FDIC regulated banks. Every bank merger application should include a new and rigorous examination of each bank's fair lending compliance. The FDIC should significantly increase its fair lending and civil rights enforcement and prohibit mergers by banks with pending fair lending referrals or consent decrees for fair lending, lending discrimination, or redlining cases.

Proposed rule would ease merger applications for banks with spotty consumer compliance records: The Bank Merger Act requires the FDIC to only approve mergers that will improve the range, quality, and price of banking service offerings to all consumers and communities, especially for lower-income, Black, and Latine consumers and communities. The proposed rule would encourage the FDIC to approve mergers of banks with middling or even poor consumer compliance ratings.[93] These lower consumer compliance ratings are inconsistent with the criteria that mergers enhance the convenience and needs of customers and communities.

The proposed rule states that the FDIC would "generally find favorably on the convenience and needs statutory factor for acquiring institutions that have received a 3 rating on its most recent consumer compliance examination."[94] The FDIC's Consumer Compliance Manual states that a bank with a 3 consumer compliance rating is "deficient at managing consumer compliance risk in the institution's products and services and at limiting violations of law and consumer harm."[95]

More alarmingly, the proposed rule explicitly encourages mergers by banks with the *worst* consumer compliance records. The proposal states that acquiring banks with a 4 (seriously deficient) or 5 (critically deficient) rating "would not necessarily be a barrier" to merger approval.[96] Seriously deficient ratings indicate that the banks "severe inadequacies in core compliance areas" mean that risk violating statutory and regulatory protections that are necessary "to prevent consumer harm."[97]

Currency received satisfactory or outstanding CRA ratings between 2019 and 2023. AFREF analysis of OCC CRA Performance Evaluations. 2019-2023. Accessed April 2024.

[92] The declining fair lending enforcement is a trend. The FDIC referred 12 cases in 2022, 7 in 2023, 3 in 2024, and zero in 2025. Consumer Financial Protection Bureau (CFPB). "Fair Lending Report of the Consumer Financial Protection Bureau." June 2023 at 33; CFPB. "Fair Lending Report of the Consumer Financial Protection Bureau." June 2024 at 33; CFPB. "Fair Lending Report of the Consumer Financial Protection Bureau for 2024." December 2025 at 25; CFPB. "Fair Lending Report of the Consumer Financial Protection Bureau for 2025." September 2026 at 25.

[93] The proposed rule states that there is "high probability the FDIC would find favorably on the convenience and needs statutory factor" for banks with the top two consumer compliance ratings. 91 Fed. Reg. 182 at 60220.

[94] 91 Fed. Reg. 182 at 60220.

[95] FDIC. "II-13 Consumer Compliance Ratings." Consumer Compliance Manual. March 2017.

[96] 91 Fed. Reg. 182 at 60220.

[97] *Ibid.*

Critically deficient ratings represent "a demonstrated lack of willingness or capability" to obey statutory and regulatory requirements to protect consumers.[98]

The FDIC should prohibit mergers that include acquiring or target banks with the two lowest consumer compliance ratings because these mergers would fail to meet the statutory convenience and needs test. Merging banks with only a consumer compliance rating of 3 should receive enhanced scrutiny and a presumption that the proposed merger would not meet the convenience and needs test.

Proposed rule inappropriately allows approval for mergers by banks with significant unresolved deficiencies: The proposed rule would direct the FDIC to *consider* merging banks' "plans to timely remediate any previously unresolved deficiencies" in their supervisory record, including poor CRA performance and significant consumer compliance shortcomings.[99] The proposal states that the FDIC may offer "a favorable finding on a statutory factor despite identified weaknesses" if the banks provide a plan to remediate these significant problems.[100]

The FDIC should deny proposed mergers that include banks that have unresolved deficiencies that would fail to meet the statutory convenience and needs test. Approving mergers for banks with deficiencies does not heighten their compliance. For example, Federal regulators acknowledged that Capital One had a problematic pattern of deceptive marketing and other consumer complaints, but nonetheless approved mergers with Hibernia, North Fork, and ING.[101] But Capital One continued to rack up nearly $300 million in deceptive marketing and unfair debt collection settlements after the 2012 ING merger was approved.[102] The FDIC should impose conditions to require merging banks to fully resolve any deficiencies *before* the merger is approved, not allow deficient banks to be rewarded with merger approvals merely by promising to resolve deficiencies in the future.

V. Proposed rule undermines statutory requirement to prevent mergers that would threaten the stability of the banking and financial system

The proposed rule undermines the statutory prohibition against approving mergers that could undermine the stability of the banking and financial system. Following the 2008 financial crisis, Congress added financial stability considerations to the Bank Merger Act that prohibit banking regulators from approving mergers that do not meet the financial stability consideration.[103] The

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[98] 91 Fed. Reg. 182 at 60220.sett

[99] Proposed 12 CFR §333.5(3). 91 Fed. Reg. 182 at 60234.

[100] *Ibid.*

[101] Federal Reserve System. "Capital One Financial Corporation: Order Approving the Merger of Bank Holding Companies." August 16, 2005 at 6; Federal Reserve System. "Capital One Financial Corporation: Order Approving the Merger of Bank Holding Companies." November 8, 2006 at note 13 at 6; Federal Reserve System. Capital One Financial Corporation. Order Approving the Acquisition of a Savings Association and Nonbanking Subsidiaries. FRB Order No. 2012-2. February 14, 2012 at 12 to 13.

[102] "AG reaches $13.5 million settlement with Capital One." *Charleston Gazette.* January 17, 2012; Douglas, Danielle. "Capital One to pay $210 million for deceptive credit card practices." *Washington Post.* July 13, 2012; ; "Capital One fined for misleading millions of consumers." *BBC.* July 18, 2012; DOJ. [Press release]. "Justice Department reaches $12 million settlement to resolve violations of the Servicemembers Civil Relief Act by Capital One." July 26, 2012; *In re: Capital One Telephone Consumer Protection Act Litigation.* No. 1:2012cv10064 - Document 329 3-5, 43 (N.D. Ill. 2015).

[103] Dodd-Frank Wall Street Reform and Consumer Protection Act. Pub. L. 111-113 §604(d) and (f). July 21, 2010; 12 USC 1828(c)(5)(B).

proposed rule would grant a safe harbor to mergers that create $100 billion banks, create a qualitative balancing test that would discourage the careful consideration of a proposed merger's impact on systemic risk, and allow for fire sale sales of distressed banks even if the transaction amplified the risks of too-big-to-fail banks and imperiled financial stability.

Bank mergers can contribute to the fragility of the financial system. Mergers can pose risks to the stability of banking system and the economy by increasing bank size, accumulating concentrated asset risk, increasing institutional complexity, and magnifying other dimensions of risk that can easily propagate a financial contagion that can cascade across the financial system and the economy. The wave of bank mergers after 1995 concentrated financial risk into larger banks that contributed to the scale and depth of the financial crisis as some banks that grew from mergers collapsed.[104]

This lesson was learned at great economic cost, and these costs disproportionately harmed lower-income, Black, and Latine households and communities. These results were not unforeseen. A 2003 International Monetary Fund paper analyzed the 1990s banking mergers and found that larger financial firms took on more risk than smaller firms and that "the moral hazard induced incentives appear to have outweighed the risk reductions potentially available through scale or scope economies."[105] In 2004, the Federal Reserve Bank of San Francisco warned that mergers that lead to:

> the creation of megabanks also heightens concerns about systemic risk. When banking activities are concentrated in a few very large banking companies, shocks to these individual companies could have repercussions to the financial system and the real economy.[106]

These risks were magnified for the megabanks that grew through mergers to become too-big-to-fail. Too-big-to-fail institutions can be deemed to be "so large and interconnected with other financial institutions or so important in one or more financial markets that their failure would have caused losses and failures to spread to other institutions," according to the Financial Crisis Inquiry Commission.[107] When too-big-to-fail banks face economic stresses, the government has a substantial incentive to intervene and prevent their failure to prevent economic fallout.[108] The implicit too-big-to-fail rescue subsidy increases the fragility of the system because it shields very large banks from the negative consequences of their risk-taking and creates an incentive to take greater risks than they otherwise would.[109] The implicit subsidy also confers an anticompetitive advantage on too-big-to-fail banks that can pursue outsized risks and profits as compared to their smaller rivals.

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[104] The number and size of bank mergers accelerated after the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 and the 1995 bank merger guidelines went into effect that facilitated interstate mergers and the merger approval process.

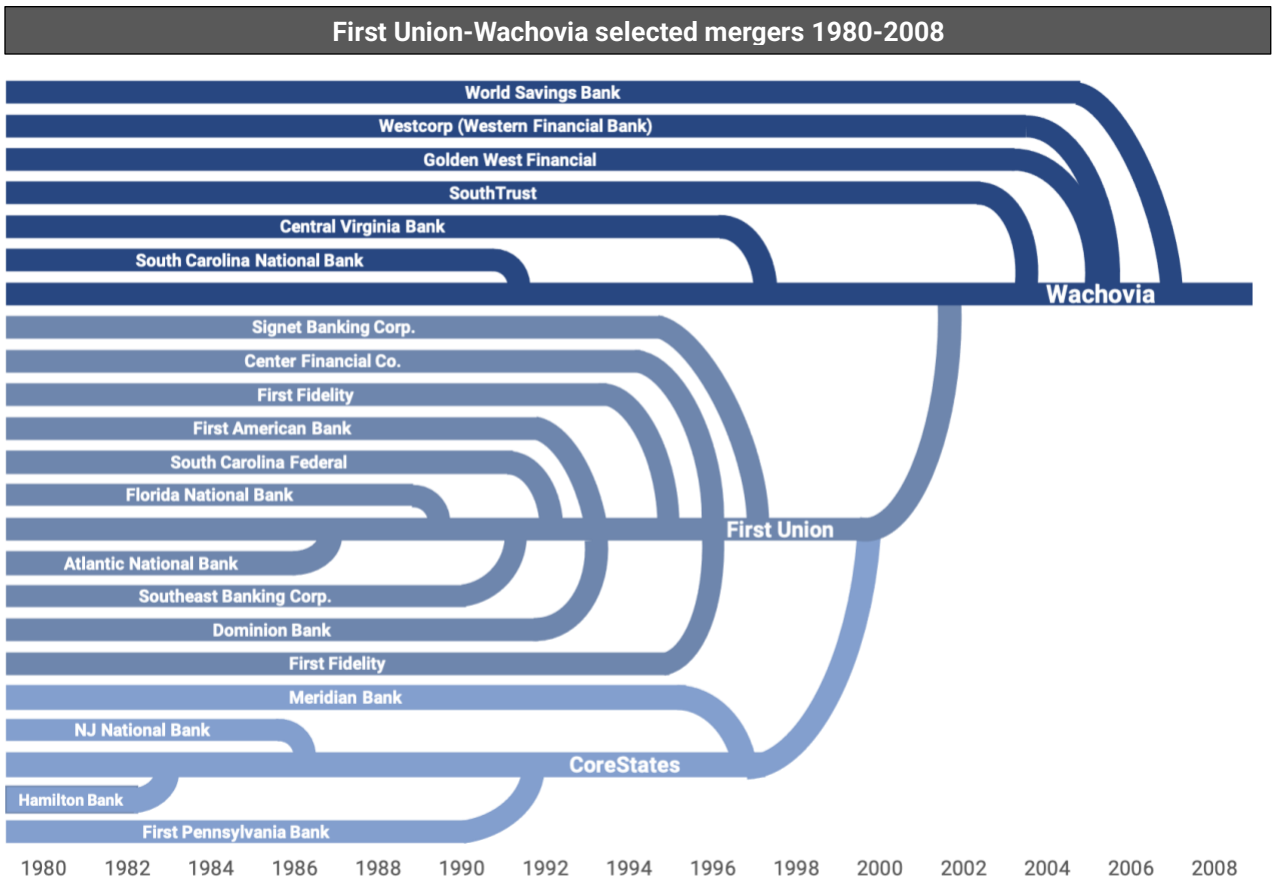
[105] De Nicoló, Gianni. International Monetary Fund. "Bank Consolidation, Internationalization, and Conglomeration: Trends and Implications for Financial Risk." IMF Working Paper WP/03/158. July 2003 at 5.

[106] Kwan, Simon. Federal Reserve Bank of San Francisco. "Banking Consolidation." *FRBSF Economic Letter*. No. 2004-15. June 18, 2004 at 3.

[107] Financial Crisis Inquiry Commission. "The Financial Crisis Inquiry Report." January 2011 at 386.

[108] AFREF. Letter to the Financial Stability Oversight Council. May 13, 2019 at 6.

[109] Omarova, Saule T. Cornell University Law School. "The 'Too Big to Fail' Problem" *Minnesota Law Review*. Vol. 103. January 2019.



Federal banking regulators summarily approved scores of smaller (and then larger) mergers that built some of the biggest banks that failed during the financial crisis. Some of banks that grew predominantly through mergers, like Wachovia and Washington Mutual (WaMu), were more likely to fail during the financial crisis than other banks.[110] First Union ballooned in size from a medium-sized North Carolina bank to one of the biggest institutions in the country through more than 90 acquisitions from 1985 to 2000 (see Figure).[111] Although later larger acquisitions like First Fidelity in 1995 and CoreStates in 1998 were then the biggest bank mergers in history,[112] there were many early and smaller mergers that would have been rubberstamped by the proposed rule. In late 2007, Wachovia reported steep losses in subprime mortgage backed securities and its subprime mortgage portfolio, but it still bought World Savings Bank and its large pool of subprime payment-option adjustable rate mortgages in 2008.[113] The OCC approved the World Savings acquisition with a single 120-word paragraph stating that "The OCC considered the financial and managerial resources of the

[110] Kim & Seim. 2016 at 2.
[111] Cowley, Stacey. "Edward E. Crutchfield, 82, dies; Banker's deals reshaped the industry." *New York Times*. January 25, 2024.
[112] Knight, Jerry. "First Union to buy First Fidelity of N.J." *Washington Post*. June 19, 1995; "First Union merger is final." *CNN*. April 28, 1998.
[113] White, Ben. "Wachovia subprime valuation falls." *Financial Times*. November 8, 2007; "Wachovia finally completes acquisition of World Savings." *Sarasota Herald-Tribune*. February 18, 2008; Craver, Richard. "Wachovia collapse: 10 years later." *Winston-Salem Journal*. October 6, 2018.

banks, their future prospects, and the convenience and needs of the communities to be served […] and found them consistent with approval."[114]

By mid 2008, Wachovia was the third largest bank in the country by deposits, but its concentrated pool of crumbling subprime mortgage assets—fueled by its acquisitions—were dragging down the bank.[115] The day after WaMu failed (also because of a concentration in high-risk subprime mortgage assets), Wachovia told its regulators it could not pay its creditors and the federal regulators invoked a systemic risk exemption for the first time in history to backstop not just insured depositors but also Wachovia's debtholders and shareholders. This too-big-to-fail federal intervention was averted when Wells Fargo agreed to purchase Wachovia without FDIC assistance, but it demonstrated how merger-driven fragility could create systemic risks that force the government to "take action to avert systemic problems in the banking industry."[116]

After the crisis, multiple academic studies identified bank mergers as a substantial cause of the financial meltdown. A 2016 University of Pennsylvania paper found that the bank mergers and rising concentration led to higher leverage levels and lower levels of capitalization.[117] A 2017 Harvard University paper noted that deregulation that led to accelerated bank mergers and consolidation increased interconnectedness that "increased the chances of a large shock occurring."[118] A 2014 *Journal of Banking & Finance* study of 440 bank acquisitions between 1991 and 2009 found that "mergers coincide with statistically and economically significant increase in the contribution of the acquirer to the systemic risk of the financial sector."[119]

Proposed rule creates a broad exemption from financial stability test: The proposed rule creates a safe harbor for transactions that would automatically be determined to have "no financial stability concerns" if the merged bank would have fewer than $100 billion in assets and the target bank had below $20 billion in assets.[120] This safe harbor would automatically exempt many mergers of the kind that created very large institutions that could pose financial stability risks from the systemic risk evaluation, moving them forward without any evaluation of the complexity, interconnectedness, or localized substitutability of the resulting bank. The proposed rule asks whether—not if—the $100 billion combined and $20 billion target threshold "is the appropriate threshold to preemptively conclude that acquisitions […] do not have a material impact on risks to the stability f the U.S. banking or financial system regardless of the size and complexity of the acquiring financial institution."[121] It is not a question of where the threshold should be set, it is whether the FDIC should set a presumptive standard at all. The Bank Merger Act simply does not

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[114] OCC. Re: Application by Wachovia Bank, NA, to Acquire the Branches of World Savings Bank, FSB. Conditional Approval No. 826. December 2007 at 8.
[115] FDIC. Summary of Deposits—Market Share Reports. June 30, 2008; Stempel, Jonathan. "Wachovia has $23.9 billion loss on writeoff, mortgages." *Reuters*. October 22, 2008.
[116] FDIC. "Crisis and Response: An FDIC History, 2008—2013." 2017 at xx to xxi
[117] Kim & Seim. 2016 at 14.
[118] Zhang, Jeffery Y. Harvard University. John M. Olin Center for Law, Economics, and Business. Discussion Paper No. 69. "The Costs and Benefits of Banking Deregulation." April 25, 2017 at 38.
[119] Weiss, Gregor N.F., Sascha Neumann, and Denefa Bostandzic. "Systemic risk and bank consolidation: International evidence." *Journal of Banking & Finance*. Vol. 40. 2014 at 166.
[120] The financial stability safe harbor excludes all *de minimis* transaction and any transaction that does not result in a globally systemically important bank or a category II, III, or IV banking organization under 12 CFR §252.5. This effectively excludes any transaction that would result in an institution with under $100 billion in assets. Proposed 12 CFR §333.5(g)(1). 91 Fed. Reg. 182 at 60235; 91 Fed. Reg. 182 at 60221.
[121] 91 Fed. Reg. 182 at 60221.

give the FDIC the authority to establish thresholds to presumptively ignore the systemic risk factor in evaluating prospective bank mergers.

Many of the mergers that expanded First Union-Wachovia and WaMu would have fallen under this threshold but nonetheless contributed to the institutions' failure. As of 2026, there are 67 potentially acquiring banks with assets between $20 billion and $80 billion that would qualify for this safe harbor and more than 4,000 potential target banks with fewer than $20 billion in assets—nearly 60 of those between $10 and $20 billion in assets.[122] The proposed safe harbor would make it easier for banks to amass considerable size, complexity, and interconnectedness without any evaluation of the potential risks these mergers might pose to the banking and financial system. The FDIC lacks statutory authority to create a class of mergers that would presumptively meet the systemic risk statutory factor.

Proposed rule undermines consideration of systemic risk through balancing test: The proposed rule establishes a qualitative balancing test that would tend to circumscribe rigorous evaluation of proposed mergers that could contribute to an institution's failure and transmission of risk to the banking and financial system.[123] For mergers larger than the safe harbor, the proposed rule provides justification to approve mergers that could pose risks to financial stability.

Although it recognizes that size, complexity, interconnectedness, and substitutability remain critical factors in assessing the potential risk a merger could pose to the stability of the banking and financial system, the proposed rule primarily focuses on size and effectively encourages the FDIC to downplay the potential impact of proposed mergers on financial stability. If the change in size was "relatively limited" (which is not defined), that would "weigh in favor of finding favorably on the financial stability statutory factor."[124] Further, it states that "if two regional banks of equal size merged, resulting in a materially larger institution, this would not necessarily by itself raise financial stability concerns." These explanatory notes suggest that the FDIC should not raise financial stability concerns with mergers whether they are small or large.

But as discussed above, the routine and foregone approval of banking mergers without careful consideration contributed to the financial fragility that contributed to systemic risk and bank failures. For example, federal banking regulators approved a Silicon Valley Bank merger that contributed to its collapse. In 2021, the Federal Reserve approved SVB acquisition of Boston Private Bank that created a $126 billion institution.[125] This merger would have fallen well within the guidance for a merger where "the change in size was relatively limited," warranting approval. Indeed, the Federal Reserve's approval of the merger declared that the resulting "organization would not be a critical services provider or so interconnected with other firms or markets that it would pose significant risk to the financial system in the event of financial distress."[126] This approval contributed to SVB's fragility and ultimate demise, which could have become a contagion that affected financial stability without the dramatic intervention of banking regulators.

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[122] FDIC. BankFind Suite: Financial/Regulatory Search & Reporting. Second Quarter 2026. Accessed November 2026.
[123] Proposed 12 CFR §333.5(g)(2).
[124] 91 Fed. Reg. 182 at 622.
[125] Federal Reserve System. Order Approving the Merger of Bank Holding Companies, the Merger of Banks, and the Establishment of Branches. FRB Order No. 2021–08. June 10, 2021 at 3.
[126] *Ibid.* at 18.

Proposed rule grants a fire sale exemption to systemic risk for institutions "at risk of failure" that amplifies the too-big-to-fail problem: The proposed rule creates an exemption to mergers that increase systemic risk for acquisitions that purportedly support financial stability because the target bank is at risk of failure.[127] The FDIC should address failing banks through orderly resolution instead of facilitating rapid fire sales to larger banks that would violate the prohibition against mergers that increase the risk to the banking and financial system.

The proposal states that these sales "may be highly beneficial for financial stability by reducing the likelihood of failure of a large institution, despite the creation of a much larger combined institution."[128] This approach is exactly the rationale that the federal banking regulators have used for years to allow some of the biggest banks to become much larger by absorbing large failing banks—most of which became so large through inappropriate merger approvals—even though the resulting merged institution is larger, more complex, and more interconnected and creates considerably greater risks to financial stability if it were to face headwinds.

In the wake of the financial crisis, some of the biggest banks acquired failed banks (for example, Wells Fargo's takeover of Wachovia and JPMorgan Chase's absorption of WaMu), that put them over the threshold prohibition of acquisitions that create banks that hold more than 10 percent of deposits nationwide.[129] After First Republic failed in 2023, JPMorgan Chase acquired it in a fire sale that added about $200 billion in assets and was hailed as the bank's "best deal in decades" that would generate an additional $1 billion in net annually.[130] The acquisition increased the size and risk that JPMorgan posed to the financial system, but was approved over other bids by smaller regional banks that would have posed considerably less risk.[131] The proposed rule creates a loophole that allows the largest banks free rein to acquire any failed or failing bank without consideration of how the transaction amplifies systemic risk and the problem of too-big-to-fail.

VI. Proposed rule undermines public participation with regard to mergers that impact the public interest

The proposed rule considerably reduces public participation in the bank merger process. Banks are publicly chartered to serve the economic needs of their communities and the public has a right to participate in the consideration of bank mergers that will affect their economic futures. The proposal reduces the public's opportunity to comment on proposed mergers and encourages the FDIC to discount or ignore public concerns about the potential negative impact of proposed mergers. The proposed rule reduces the public notification—from three published notices to two—and shortens the time between notices, reducing the ability of the public to be informed of proposed transactions.[132]

The proposed rule converts the first amendment right to petition the government into an optional opportunity to provide input. The current FDIC regulations clearly enumerate that "the public has a

[127] Proposed 12 CFR §333.5(g)(2). 91 Fed. Reg. 182 at 60235; 91 Fed. Reg. 182 at 60222.
[128] 91 Fed. Reg. 182 at 60222.
[129] Sanati, Cyrus. "Merging banks surge past U.S. deposit cap." *New York Times*. October 17, 2008; 12 USC §1831u(b)(2).
[130] Bradham, Breanna. "Bove says First Republic may be JPMorgan's best deal in decades." *Bloomberg*. May 1, 2023.
[131] Hruska, Anna. "Warren blasts First Republic's 'troubling' sale to JPMorgan." *Banking Dive*. May 19, 2023.
[132] Proposed 12 CFR §303.65(a) and §303.65(a)(2). 91 Fed. Reg. 182 at 60231.

right to comment on, or to protest, these types of transactions."[133] Instead of a right, the proposed rule only states that "the public may comment."[134] This right to comment is further blurred down in the proposed rule's changes to public notice. The existing regulation states that notices must be published "to fully appraise the public of this right" to comment.[135] Instead, the proposed rule converts a right into an "opportunity to comment."[136] This inappropriately erodes the public's appropriate role in the FDIC's consideration and evaluation of merger transactions and this language must be deleted from the final rule.

The proposed rule discourages public hearings. The explanatory text of the proposed rule effectively discourages the FDIC from holding hearings where the public can provide input into the potential negative impacts of proposed mergers. The proposed rule states that "the public interest is generally not served by expending resources on hearings" and that it expects public hearings will be "exceptionally rare."[137] This language inappropriately suggests that the public stakeholders (depositors, customers and potential customers, local communities, local elected leaders, etc.) are an obstacle the FDIC's merger review process and that the public's input is harmful. This language must be removed from the final rule.

The proposed rule's acceleration of merger consideration also reduces the ability for the public to comment on proposed mergers. The proposed *de minimis* consideration of 5-days would effectively make it impossible for the public to provide input. Even the expedited 45-day consideration would be difficult for larger merger applications. The reality is that 30-days is far too short a period to provide meaningful input regarding large and complex transactions.

Moreover, the proposed rule explicitly discourages the extension of review periods, and thus the extension of public comment periods. There is no mechanism to extend *de minimis* merger review periods. And the proposed rule allows but does not encourage the extension of review for standard and larger merger reviews, but only "due to extenuating circumstances."[138] The proposed rule itself does not delineate what might constitute an extenuating circumstance but the proposal explanation offers only one example: "accounting errors affecting one of the institutions involved in the merger."[139] Communities and bank customers should have the opportunity to voice their concerns about how any proposed merger could affect their finances and families in a more accessible format than the written comment process. Rather than constraining the public's ability to comment, the FDIC should make it easier for the public to comment, participate in hearings, and successfully request extensions of the merger review process (which the proposal severely restricts for expedited transactions, as described in Section II).

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Federal banking and antitrust regulators should strengthen the woefully outdated and ineffective bank merger review process to fulfill the statutory goals of the Bank Merger Act. The purpose of merger review is to carefully consider the potential detrimental impact of bank mergers on

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[133] 12 CFR §303.7.
[134] Proposed 12 CFR §303.7. 91 Fed. Reg. 182 at 60228.
[135] 12 CFR §303.7(a).
[136] Proposed 12 CFR §303.7. 91 Fed. Reg. 182 at 60228.
[137] 91 Fed. Reg. 182 at 60207.
[138] Proposed 12 CFR §303.64(f)(2) and §303.64(e)(2). 91 Fed. Reg. 182 at 60231.
[139] 91 Fed. Reg. 182 at 60209.

customers and communities as well as the stability of the banking system and the economy. For the past three decades, the merger review process has been designed and implemented primarily with the goal of approving bank mergers rather than carefully evaluating the impact of proposed mergers. The proposed rule goes even further in this mistaken direction. The proposed rule would not only accelerate merger consideration, but also rig the metrics of merger evaluation so that virtually all mergers will get approved, approved far more quickly, with more limited public input, and with far less regulatory scrutiny. This contradicts the statute and congressional intent of the Bank Merger Act and will make the banking industry more consolidated to the detriment of consumers, communities, and the economy. The FDIC must rescind this proposed rule.

Sincerely.

Americans for Financial Reform Education Fund