

Submitted via Email

August 23, 2022

Jason Almonte, Director for Large Bank Licensing
340 Madison Avenue, Fifth Floor
New York, New York 10173

William Spaniel, Senior Vice President
Federal Reserve Bank of Philadelphia
100 North 6th Street
Philadelphia, Pennsylvania 19105-1521

Dear Mr. Almonte and Mr. Spaniel:

The undersigned organizations write to urge you to reject the proposed merger of TD Bank and First Horizon Bank.

We are very concerned about the wave of bank mergers and acquisitions that have been approved by the federal bank regulators in the past several years. Bank consolidation has produced historically high concentration in the U.S. financial sector. The number of U.S. banks has plummeted from 18,000 in the 1980s to less than 5,000 today.¹ More than three-quarters of local banking markets are considered uncompetitive, with a Herfindahl-Hirschman Index exceeding the DOJ's threshold for "high concentration."² Nonetheless, federal bank regulators have not formally rejected a merger application in over 15 years.³

The current merger review process by both the Department of Justice and banking regulators has failed to protect the public interest from growing banks exercising market power to impose higher costs on consumers, reduce the volume or quality of banking services, or prevent 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, which imposed widespread and long-lasting economic costs on everyone, but especially lower-income people and people of color. If this proposed merger is approved by the regulators, TD Bank will become the sixth largest bank by assets in the United States.⁴

¹Jad Edlebi, Bruce C. Mitchell, Jason Richardson. "[The Great Consolidation Of Banks And Acceleration Of Branch Closures Across America: Branch Closure Rate Doubled During The Pandemic.](#)" National Community Reinvestment Coalition. February 2022.

²Andrew P. Meyer. "[Market Concentration and Its Impact on Community Banks.](#)" The Regional Economist by The Federal Reserve Bank of St. Louis. April 2018.

³Jeremy C. Kress. "[Modernizing Bank Merger Review.](#)" Yale Journal on Regulation (2021). Volume 37. Pg. 439. ⁴ Stephanie Hughes. "[TD to become sixth-largest U.S. bank after US\\$13.4 billion deal to buy First Horizon.](#)" Financial Post. February 2022.

The Bank Merger Act requires assessment of the merger on competition, safety and soundness, convenience and needs of the community to be served, and the financial stability of the banking system.

TD collects a disproportionate amount of overdraft fees relative to peer financial institutions and has failed to engage in innovative, consumer friendly overdraft reforms. In addition, it has a recent history of enforcement actions for unfair and deceptive practices around account opening, overdraft protection and fees. TD Bank’s policies pose a risk to its safety and soundness through increased reputational risk.

This merger will result in a significant presence in the Southeast, in states like Tennessee, Texas, Arkansas, and Florida, among others, where there is a concentration of Black and Latino communities and poverty, often overlapping.⁵ Those communities bear the acute and disproportionate burden of overdraft fees, calling into the question whether the needs and convenience of the community will be met.

Concerns about this merger are significant enough to have caught the attention of Members of Congress. CFPB issued a request for information on junk fees, for which several of the undersigned consumer advocates submitted comments directed towards overdraft and NSF fees. Director Rohit Chopra specifically called out overdraft and NSF fees as a drain on the resources of consumers and a “feast” for large financial institutions.⁶

Below we outline the risks this merger poses to the financial institutions involved, highlight consumer and small business needs, and elaborate on the harm done by excessive consolidation in the banking sector.

I. TD Bank’s Overdraft Policies Do Not Serve the Convenience and Needs of Communities and Create Reputational Risk

a. Overdraft and NSF Fees Are Harmful to Communities of Color

In the United States, TD Bank has long been known for its heavy reliance on overdraft fees.

Overdraft fees have become a cash cow for financial institutions like TD. This money is mostly made off the backs of some of America’s most financially exposed families, including communities of color. The majority of these fees are shouldered by banks’ most vulnerable customers, often driving them out of the banking system altogether.

Banks’ overdraft practices cause devastating, lasting harm to the customers whose financial health banks should be supporting. Nine percent of account holders pay almost 80% of the billions paid annually in these fees.⁷ These consumers tend to carry low balances—averaging less than \$350.⁸

⁵ See [Mapping America’s diversity with the 2020 census \(brookings.edu\)](https://www.brookings.edu/wp-content/uploads/2016/08/01-exploring-concentrated-poverty-in-the-southeast-2016-08-24.pdf), [01-exploring-concentrated-poverty-in-the-southeast-2016-08-24.pdf \(atlantafed.org\)](https://atlantafed.org/wp-content/uploads/2016/08/01-exploring-concentrated-poverty-in-the-southeast-2016-08-24.pdf)

⁶ [Prepared Remarks of CFPB Director Rohit Chopra on the Junk Fees RFI Press Call | Consumer Financial Protection Bureau \(consumerfinance.gov\)](https://www.consumerfinance.gov/about-us/press-releases/prepared-remarks-of-cfpb-director-rohit-chopra-on-the-junk-fees-rfi-press-call)

⁷ CFPB 2014 Data Point at 12, Table 3; see also [CFPB Data Point: Frequent Overdrafters](#) at 16, Table 2 (Aug. 2017), [CFPB 2017 Data Point].

⁸*Id.*

the banking system is difficult.¹⁰ Among people with checking accounts, Black and Latino Americans are more likely than white Americans to incur overdraft fees.¹¹ African Americans and Latinos—already four to five times more likely to be unbanked than white Americans¹²—are disproportionately harmed by ejection from the financial mainstream.¹³

b. TD Collects A Disproportionately Large Share of Overdraft and NSF Fees and Has Failed to Innovate

An analysis of Call Report data indicates that in 2019, before the pandemic, TD generated over \$565 million in overdraft fees, well above its peer institutions.¹⁴ Indeed, TD was the fourth largest absolute dollar generator of such fees behind only Wells Fargo, Chase and Bank of America.¹⁵ Further, overdraft and NSF fees comprised a large proportion of TD Bank’s non-interest income at 33%, compared to 4% of Chase and 7% of Wells Fargo and Bank of America shares of fee income.¹⁶

Over half of TD’s service charge income is overdraft and NSF fees. The only other bank which has such a high proportion of its income from overdraft/NSF fees is Woodforest National Bank, which has been identified as an “overdraft giant” that is reliant on such fees as part of its business model.¹⁷

⁹ The FDIC’s 2017 survey of unbanked and underbanked households indicates that over 500,000 households who once had bank accounts are currently unbanked primarily because of high or unpredictable fees. FDIC 2017 National Survey of Unbanked and Underbanked Households at Appendix Table A.17 (noting that there are 3,854,000 unbanked households who were previously banked. Of those, 10.9% cited account fees too high as the main reason they are unbanked, and 2.3% cited account fees unpredictable as the main reason, totaling 13.2%, or 508,728 previously banked households.) It is likely that in most of those cases, the fees at issue were overdraft/NSF fees, as they are both the largest fee and comprise the majority of checking account service charge revenue.¹⁰ Once ejected from the banking system, the ejecting financial institution reports the account holder to a database, like Chexsystems or Early Warning Service – a blacklist, essentially, where the consumer’s name remains for five years, often preventing the consumer from being offered a checking or savings account with another financial institution. See National Consumer Law Center and Cities for Financial Empowerment Fund, [Account Screening Consumer Reporting Agencies: A Banking Access Perspective](#) (Oct. 2015).

¹¹ [Amid Resurgence of Interest in Overdraft, New Data Reveal How Inequitable It Can Be — Financial Health Network \(finhealthnetwork.org\)](#).

¹² About 17 percent of African American and 14 percent of Latino households are unbanked, compared to 3 percent of white households. [FDIC 2017 Survey of Unbanked and Underbanked Households](#) at 19 Table 3.2. ¹³ Civil rights leaders have noted the cost of this financial disenfranchisement when urging reform of bank overdraft practices: “Once a person is ejected from the mainstream financial system, it becomes difficult to reenter. And the unbanked and underbanked are more likely to end up with no choice except alternative financial services, which are often more expensive and less secure than a responsible mainstream checking account.” Wade Henderson, President and CEO of The Leadership Conference on Civil and Human Rights, and Hilary Shelton, Washington Bureau Director for the NAACP, [Predatory Overdraft Practices Should Be Stopped](#), The Hill, Aug. 20, 2013. ¹⁴ Peter Smith, Shezal Babar & Rebecca Borné, Center for Responsible Lending, [Overdraft Fees, Banks Must Stop Gouging Consumers During the COVID-19 Crisis](#) 10 (June 2020).

¹⁵ [Overdraft - NSF Metrics for Top 20 banks \(consumerfinance.gov\)](#)

¹⁶ [crl-overdraft-covid19-jun2019.pdf \(responsiblelending.org\)](#)

¹⁷ [A few small banks have become overdraft giants \(brookings.edu\)](#)

In recent months there has been a significant shift in the overdraft practices of large banks, but TD has made much smaller changes that do not serve the needs of lower income account holders. For example, PNC has limited overdraft charges to one per day, Bank of America has greatly reduced the per transaction fee and reduced the number of fees charged per day and per year, and Capital One and Citi have eliminated overdraft fees altogether, forgoing millions in such revenue.¹⁸ On the other hand, TD Bank has only made modest changes, by eliminating NSF fees, increasing the cushion for overdraft charges to \$50, and extending the grace period for deposits to 24 hours.¹⁹ Much more importantly, TD continues to charge consumers \$35 for overdraft coverage up to three times per day and it continues to charge overdraft fees on ATM transactions and debit card purchases.²⁰ (In contrast, in Canada TD charges \$5 per overdraft and charges only one fee per day.)

Peer financial institutions were already experiencing a downward trend in collection of overdraft fees between 2019 and 2021 prior to reforms, with most of the eight largest banks experiencing a 20% to 30% decline in overdraft/NSF revenue between 2019 and 2021. Yet TD experienced a much smaller decline in revenue of 15.7%.²¹

Not surprisingly, post reforms, the gap between TD and other banks with respect to their overdraft revenue has widened. In the first quarter of 2022, PNC experienced a 53% decline in overdraft relative to Q1 2019, Bank of America experienced a 36% decline, and Capital One reported a 96% decline in overdraft fees. Yet for TD Bank, overdraft/NSF revenue in Q1 2022 was only 7.5% lower than Q1 2019.²² TD Bank saw the least change in its overdraft revenue in this period of any of the banks that CFPB studied.²³

c. TD Bank Has a Recent History of Enforcement Actions On Account Abuses

In 2020, CFPB officials under the Trump administration reached a \$122 million settlement with TD over its unfair and deceptive practices. The complaint alleged a pattern and practice of concealing the ability of consumers to opt out of overdraft coverage. CFPB alleged that TD charged overdraft fees on debit accounts without obtaining customer consent and misrepresented the terms and conditions of its optional overdraft service. The facts allege violations of the Consumer Financial Protection Act, Electronic Funds Transfer Act, Regulation V, Regulation E and the Fair Credit Reporting Act.

The violations contained in the complaint should be of concern to the FDIC and OCC because it may suggest TD inflates its overdraft revenue through unfair and deceptive practices.

d. Legislators Have Raised Concerns Around the Merger and Overdraft Generally

¹⁸ [Citi Continues to Bolster its Focus on Financial Inclusion by Eliminating Overdraft Fees \(citigroup.com\)](#), [Bank of America Announces Sweeping Changes to Overdraft Services in 2022, Including Eliminating Non-Sufficient Funds Fees and Reducing Overdraft Fees](#)

¹⁹ [TD Bank Announces Additional Enhancements to Overdraft Policies in 2022 | TD Stories](#) ²⁰ [Citi Continues to Bolster its Focus on Financial Inclusion by Eliminating Overdraft Fees \(citigroup.com\)](#), [Bank of America Announces Sweeping Changes to Overdraft Services in 2022, Including Eliminating Non-Sufficient Funds Fees and Reducing Overdraft Fees](#)

²¹ [Banks' overdraft/NSF fee revenues evolve along with their policies | Consumer Financial Protection Bureau \(consumerfinance.gov\)](#)

²² *Id.*

²³ *Id.*

Members of Congress including Senator Elizabeth Warren, Representatives Katie Porter, Jesus “Chuy” Garcia, and Al Green have called for this merger to be halted as well. Their letter to the OCC highlights their concern regarding a Capitol Forum report on TD’s unfair and deceptive practices about account sales. The report alleges TD Bank employees were incentivized to open unnecessary or unauthorized accounts and to sign consumers up for potentially costly overdraft protection.²⁴ As they note, the Capitol Forum report suggests that these problems persist in 2022. HR 4277, sponsored by Representative Carolyn Maloney, was marked up in the House Financial Services Committee in July 2022, signaling further support for overdraft reform.

e. TD Ultimately Risks Reputational Harm and Safety and Soundness With Its Outdated Policies

As stated by Comptroller Hsu, “bank mergers should serve communities.”²⁵ The picture that emerges from the TD’s punitive overdraft policies and unfair and deceptive account practices, along with legislator opposition, is that TD is out of step with leaders in the field. While other financial institutions have signaled their desire to assist consumers, not extract much needed funds, TD remains harmful to consumers. TD Bank’s insistence on maintaining this large stream of revenue that by definition, depends on the consumers who lack funds, cannot serve the needs of low-income communities.

Regulators should not ignore the issues raised here. TD is at risk of reputational harm that could cause it to lose customers, erode its competitiveness and affect the ability to attract new customers. Products such as the no-overdraft Essential Banking accounts have limited features and cannot replace full service accounts, nor does it address the problems consumers have with existing accounts. Repeated, pervasive unfair and deceptive practices could pose a risk through lawsuits and enforcement actions and associated costs, fines, fees, and settlements. As noted by a recent Curinos study: “Banks and fintechs that offer consumer-friendly overdraft ... have seen their share of transaction account acquisition increase by more than 40% ... compare[d] with a decline of almost 30% for those that retained traditional overdraft programs.”²⁶

II. The Proposed Merger Would Exacerbate Already Highly Concentrated Markets

In 2020, the top four banks controlled one-third of national deposit dollars and the top ten banks controlled more than half of deposit dollars.²⁷ Moreover, banking customers and consumers face far higher concentration levels at the local level than the national concentration levels would suggest. All fifteen major metropolitan areas have significantly higher concentration levels than the national deposit concentration level.²⁸ Seven of the metropolitan areas are at least four times more concentrated, including Houston and Dallas—areas that will see a rise in TD Bank branches because of this merger.²⁹

²⁴ [2022.06.14 Letter to OCC.pdf \(senate.gov\)](#)

²⁵ [Acting Comptroller of the Currency Michael J. Hsu Remarks at Brookings on Bank Mergers and Industry Resiliency, May 9, 2022 \(treas.gov\)](#)

²⁶ [Competition Drives Overdraft Disruption - Curinos](#)

²⁷ Americans for Financial Reform Ed Fund (AFREF). “[Comment on DOJ Bank Merger Guidelines.](#)” October 2020.

²⁸ Ibid. Pg. 6 Figure 2. Metropolitan areas are Houston, Dallas, Minneapolis, New York City, San Francisco, Philadelphia, Phoenix, Washington, D.C., Los Angeles, Miami, St. Louis, Chicago, Seattle, Atlanta, Detroit ²⁹ TD-First Horizon - [OCC BMA Application](#) (Public Portion). Exhibit 10. March 2022.

The 1995 Department of Justice Bank Merger Competitive Review (“Bank Merger Guidelines”) established a concentration threshold for more thoroughly reviewing a proposed merger that created an Herfindahl-Hirschman Index (HHI)—the unit used to measure concentration levels—over 1,800 points or an increase of over 200 points as potentially creating competition problems.³⁰ Our research shows that Houston and Dallas already have HHIs above 1800—2,411 and 2,081, respectively.³¹ We urge the banking regulators—who are also mandated under Bank Merger Act to consider anti-competitive effects when reviewing a merger—to strongly scrutinize whether this proposed merger will create an undue and damaging concentration in deposit shares in these geographical areas.³²

Furthermore, as the Federal Reserve of St. Louis (FRBSL) has reported, rural banking markets are generally more concentrated than metropolitan area markets, with fewer banks competing for a smaller and more dispersed population.³³ Much of the rural south would be affected by this merger as stated in the assessment area section of TD Bank’s and First Horizon’s merger application.³⁴ The FRBSL also found that the mergers regulators approved between 2007 and 2010 considerably raised concentration levels in rural areas—the median increase was approximately 2,063 points in all 133 rural counties where bank mergers occurred during that time period.³⁵ Given that regulators have not rejected a merger application in over a decade, we expect that the concentration levels in most rural areas have only increased since then. Bank regulators and the DOJ should review this merger within this context.

III. Increased Consolidation Hurts Consumers Especially Minority Consumers

Increased market power—a result of the past two decades of excessive banking consolidation—has given banks the ability to raise prices and/or reduce the quality or range of services offered to their customers without much consequence. A 2005 Journal of Business study found that a 100-point increase in HHI increased the cost of personal consumer loans by 11.9 to 14.5 basis points.³⁶

Furthermore, a 2018 Harvard study found that when bigger banks take over smaller banks, the increase in deposit account fees and minimum balance requirements causes nearly two percent of deposits to exit annually and that deposit growth is 12 percent lower after four years.³⁷ 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.³⁸

³⁰ 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);

³¹ *Supra* note 2

³² 12 USC §1828(c)(5)

³³ 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 427.

³⁴ *Supra* note 3, Public Exhibit 4 “List of First Horizon Bank’s Branches” and Exhibit 10 “CRA Assessment Areas”

³⁵ *Supra* note 7, pgs. 435-436

³⁶ 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 at 109.

³⁷ Dixon, Amanda. “Survey: Rising ATM and overdraft fees leave consumers paying much more than they did 20 years ago.” Bankrate. October 2, 2019.

³⁸ *Ibid* at 22, 24, and 30.

Merging banks can also, and usually do, use their enhanced market power to raise the cost of home mortgages for borrowers and reduce access to credit for lower-income borrowers and borrowers of color.³⁹ 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 and that every five percent increase in market share raised conventional mortgage rates by 42 basis points and imposed even larger increases on subprime and refinance loans.⁴⁰

More troubling, it has been found that merged banks increase the approvals of conventional mortgages generally, but not to Black, Latinx, and lower-income mortgage applicants.⁴¹ They also increased the rejection rate of FHA (Federal Housing Administration) loans by Black, Latinx, and lower-income applicants.⁴² The reduction of FHA credit especially damages families of color and lower-income families, given that FHA loans have been a substantial and often primary source of mortgage credit for lower income households and borrowers of color.⁴³

IV. Small Business Lending Adversely Impacted by Mergers

Bank consolidation can reduce small business lending and have a disproportionate impact on the ability of businesses owned by people of color and women, as well as reduce very small businesses to access credit.

Larger banks are less likely to provide small business credit and more likely to provide larger loans to larger businesses because it is easier to underwrite and monitor fewer, larger loans.⁴⁴ Smaller banks provide most of the credit to small businesses, originating over 90 percent of small business loans between 2000 and 2016.⁴⁵ Thus, small businesses are especially affected by the availability of credit in local bank markets.⁴⁶

The presence of larger institutions with greater market share effectively shifts local markets away from smaller banks that are more likely to provide flexible credit needed for small businesses; larger more complex banks may be more likely to offer fewer, standardized loan products more targeted to larger businesses.⁴⁷

³⁹ Ratnadiwakara, Dimuthu and Vijay Yerramilli. Louisiana State University and University of Houston. "Effect of Bank Mergers on the Price and Availability of Mortgage Credit." September 2020. Pg. 2. ⁴⁰ *Ibid* at pgs 3 and 18 to 19.w

⁴¹ *Ibid* at pg 4.

⁴² *Ibid*

⁴³ Bhutta, Neil and Aurel Hizmo. Board of Governors Federal Reserve. "Do Minorities Pay More for Mortgages?" Working Paper No. 2020-007. 2020 at 2.

⁴⁴ Carletti, Elena, Philipp Hartmann, and Giancarlo Spagnolo. "Implications of the bank merger wave for competition and stability." January 2002. Pg. 40.

⁴⁵ Minton, Bernadette A., Alvaro G. Taboada, and Rohan Williamson. Ohio State University, Mississippi State University, and Georgetown University. "Bank Mergers and Small Business Lending: Implications for Community Development." October 2019. Pg. 3.

⁴⁶ Samolyk, Katherine and Christopher A. Richardson. Federal Deposit Insurance Corporation. Working Paper

2003-02. "Bank consolidation and small business lending within local markets." April 2003 at 22.⁴⁷ *Supra* note 19. Pg. 7.

7

Small businesses also pay higher interest rates in more concentrated banking markets.⁴⁸ 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.⁴⁹

V. Systemic Risk Concerns

Increased interconnectedness of larger financial institutions can make the financial system more fragile and pose more systemic risk to the economy. Bigger banks can contribute to systemic risk by either contributing to a financial crisis or by being overly exposed to other firms at risk in a financial crisis.⁵⁰ Asset size is arguably the most important element of bank significance to the financial system and the broader economy. Each dollar of bank assets represents a dollar of credit extended to the economy that may be withdrawn or go unsupported if a bank becomes distressed. Furthermore, bank size is directly related to the difficulty of resolving a failing bank, and deposit insurance exposure during such resolutions.

As the Federal Reserve's own research demonstrates, distress at one large bank poses a significantly greater systemic risk than distress at several smaller banks with equivalent total assets. The pro forma merger will be bigger than Washington Mutual, Countrywide, and National City when they failed in the 2008 financial crisis. Large bank mergers can exacerbate existing problems, such as the "too-big-to-fail" dynamic, as well as related problems, such as when banks become "too-big-to-manage." Too-big-to-fail status can also distort competition in banking markets by allowing large conglomerates to enjoy more favorable financing than their smaller rivals.⁵¹ To date, the banking regulators have not considered these effects when evaluating a bank merger.

VI. Conclusion

We have enumerated the risks this merger entails, to consumers, the market, and TD Bank. The potential for merger makes it urgent that TD Bank eliminate potentially unfair and deceptive practices around account initiation, overdraft fees before this merger can be approved. The FDIC and OCC must seriously evaluate market concerns raised by the undersigned.

We therefore oppose the impending merger and urge TD Bank and its regulators to further address these issues.

Signed,

Alaska PIRG
American Economic Liberties Project
Americans for Financial Reform Education Fund

⁴⁸ *Supra* note 20.

⁴⁹ *Supra* note 18. Pg. 14.

⁵⁰ 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 2017. Pg. 8.

⁵¹ Bhanu Balasubramnian & Ken B. Cyree, Has Market Discipline Improved After the Dodd-Frank Act?, 41 Journal of Banking & Finance 155, 165 (2014); Viral V. Acharya et al., The End of Market Discipline? Investor Expectations of Implicit Government Guarantees 30–33 (Munich Personal RePEc Archive, Working Paper No. 79700, 2016)

8

California Reinvestment Coalition

Center for LGBTQ Economic Advancement & Research (CLEAR)

Center for Responsible Lending

Demos

People's Action

Open Markets Institute

The Revolving Door Project

Virginia Organizing

Woodstock Institute

Copy to Assistant Attorney General Jonathan Kanter

