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# Prepared Remarks of CFPB Director Rohit Chopra at the Peterson Institute for International Economics Event on Revitalizing Bank Merger Review

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Thank you to the Peterson Institute for International Economics for hosting today's event. I especially want to thank Assistant Attorney General for Antitrust Jonathan Kanter for being here today and for his and Attorney General Merrick Garland's support of the work to bolster competition in banking and financial services.

Recently, there has been growing interest in bank mergers and how regulators and law enforcement are reviewing them. In the past eighteen months, we saw some significant transactions abandoned, including the proposed tie-up between State Street and Brown Brothers Harriman, as well as TD Bank's proposed acquisition of First Horizon. There has been ongoing debate about JPMorgan Chase's acquisition of the failed First Republic Bank, as well as news of a proposed merger of two large credit card players, Capital One and Discover.

Today, I will discuss bank mergers and consolidation. First, I will offer my observations from the recent review of the bank merger framework, initiated after President Biden signed an Executive Order on Promoting Competition in the American Economy. I then want to share some of the noteworthy features of a proposed policy statement approved by the Federal Deposit Insurance Corporation (FDIC) Board of Directors this morning. I'll conclude with some recommendations for further reform, including special considerations for dealing with failing banks.

As always, my remarks today represent the views of the Consumer Financial Protection Bureau (CFPB) and do not necessarily represent the views of any other component of the Federal Reserve System or any other member of the FDIC's Board of Directors.

## The Creep of Concentration

In recent decades, banks have gotten much bigger and far more complex. America's largest bank, JPMorgan Chase, can trace its lineage to an array of large financial firms, including Dime Bancorp, First Chicago, Banc One, Great Western, H.F. Ahmanson, First

Commerce, Chemical Banking, Washington Mutual, Bear Stearns, J.P. Morgan, and Chase Manhattan.

Bank of America, the second largest bank, is similarly the combination of many financial firms, including U.S. Trust, MBNA, Continental Bank, Security Pacific Bancorp, Nations Bank, BancBoston, BayBanks, Summit Bancorp, UJB Financial, Fleet Bank, Countrywide, Merrill Lynch, and BankAmerica.

Wells Fargo, which has had severe challenges when it comes to following the law, is the amalgamation of First Interstate Bancorp, Norwest, SouthTrust, Central Fidelity National Bank, CoreStates Financial, First Union, The Money Store, and Wachovia.

In 1990, the top 10 banks controlled 15 percent of banking sector assets. Today, they control 53 percent. This consolidation has eradicated many small and midsized relationship banks. The 15,200 banks with less than $100 billion in assets (2023 dollars) controlled 85 percent of the market in 1990. Today, the 4,500 remaining banks under $100 billion control just 29 percent of assets.

This creep of concentration came from two major spikes: 1) the deregulatory fever of the 1990s and 2) the bailouts of the 2008 financial crisis. In the 1990s, the Federal Reserve Board of Governors, the Department of Justice, and the other banking regulators seemed to drift further away from legal mandates to protect competition and resilience in the banking system. They shifted towards something more akin to a European-style national champion policy where "bigger was always better."

The annual average bank mergers per year skyrocketed from 345 in the 1980s to 510 between 1990-98, with a similarly dramatic increase in total deal value.[1] This merger wave was largely the result of interstate branching and other deregulation, as well as the Justice Department's weakening of the Bank Merger Guidelines in 1995. In 1999, Congress enacted the Gramm-Leach-Bliley Act, which tore down many of the structural separations and conflict-of-interest safeguards in banking law, opening the door to even more consolidation.

A 1999 Gallup poll from that year revealed that 43 percent of consumers reported that their bank had been sold or merged with another in the previous few years.[2] By a three-to-one margin, individuals reported that customer service got worse rather than better. Twice as many consumers felt rates on credit cards and checking accounts got worse rather than better.

Consolidation in the banking system jumped again during the 2008 financial crisis. Large financial firms on the brink of failure merged with others, often through transactions facilitated by the government. While there were benefits from the short-term stability promoted by these transactions, there are ongoing questions about how households, small businesses, and the public are bearing the long-term costs of a less competitive, less responsive, and more systemically vulnerable banking system.

While the agencies have generally shied away from conducting retrospective analyses of mergers in the banking sector, third-party analyses suggest that many of the purported efficiency gains are not passed through to customers. In fact, the cost of products often increases, and quality of service tends to erode following mergers.[3] For example, recent

CFPB research shows that larger depository institutions, which includes many that have engaged in serial acquisitions, are offering materially higher interest rates on credit card loans compared to their smaller competitors.[4] The largest banks are also offering lower interest rates on deposit accounts than small banks. Mergers can also lead to abandonment of relationship banking, difficulties with accessing small business credit, and more. This is in addition to the costs the public bears by providing implicit subsidies to the largest financial firms by virtue of being too big to fail.

## Bank Merger Act Review

In July 2021, President Biden signed an Executive Order on Promoting Competition in the American Economy. This Executive Order established a new Competition Council that would bring together cabinet departments and regulatory agencies to help revitalize competition across sectors of the economy. At the time, I served as a Commissioner on the Federal Trade Commission (FTC) and played an active role in working with agencies across the government on competition policy.

The Executive Order called on many agencies to consider updating policies and putting into place new rules. For example, it called on the CFPB to propose rules under a dormant legal authority to make it easier to switch financial products with less friction. Importantly, for our discussion today, it called on the Attorney General to review the Department of Justice's protocols with respect to bank merger review, such as the infamously outdated Bank Merger Competitive Review Guidelines established in 1995.

In 2021, the FDIC Board of Directors voted to solicit comment on the Bank Merger Act framework. Assistant Attorney General Kanter also announced that the Department of Justice's Antitrust Division would be working to "ensure that the Banking Guidelines reflect current economic realities and empirical learning, ensure Americans have choices among financial institutions, and guard against the accumulation of market power."[5] Alongside agency staff, I also personally conducted an analysis of existing processes and a range of past approval orders to compare them with those used and issued in merger review in other sectors. This analysis also included examining some of the protocols and orders of the Office of the Comptroller of the Currency and the Federal Reserve Board of Governors.[6]

By way of background, the Bank Merger Act requires affirmative approval of the acquiring bank's primary federal banking agency. Like with mergers in other sectors such as telecommunications, transportation, and energy, agencies use a multi-factor analysis. The Bank Merger Act has three key factors I want to discuss today:

- Competition: Agencies are forbidden from approving a proposed merger that would result in substantial anticompetitive effects.[7] The Department of Justice, which retains its jurisdiction to prosecute illegal mergers and anticompetitive conduct under the Sherman and Clayton Acts, plays a consultative role in the consideration of this factor, through the transmission of a report to the relevant banking agencies.
- Community: Agencies must consider the effect on the "convenience and needs of the community to be served." Given the special public benefits accorded to insured banks,

agencies must closely analyze the impact on the community. This factor is a common statutory consideration for banking applications, for example, in chartering and deposit insurance applications.

- Financial Stability: Agencies must consider the risk to the stability of the United States banking or financial system. This factor was added by Congress in 2010 to address concerns regarding the bailouts of too big to fail firms that had grown through merger sprees.

Other factors, such as the institution's ability to combat money laundering and the institution's financial and managerial resources, are also statutory considerations. Importantly, an application can be denied based on an unfavorable determination on any of these factors. Here are some of the most salient takeaways I derived from the retrospective review.

First, there were significant deficiencies in the analysis of competitive effects of a proposed merger. Both the Department of Justice and the banking agencies used analytical methods that did not appear grounded in modern market realities, such as the heavy reliance on local market share of deposits as the primary or even sole criterion for assessing competitive intensity.[8] Even when the agencies look beyond local deposit markets, one is hard-pressed to find proof of such rigorous analyses in the public approval orders.

Second, there were material gaps between the information requested in Bank Merger Act applications and the materials required for submission under the pre-merger notification regime. The Hart-Scott-Rodino Act requires firms engaged in mergers to notify the Federal Trade Commission and the Department of Justice by making a filing that provides important details about proposed transactions. Banks are exempt from this requirement if the transaction requires approval under the relevant bank merger statutes, which have their own application form.

In the review, we identified a number of places where items requested in the Hart-Scott-Rodino filing were not requested in a Bank Merger Act application. For example, the Hart-Scott-Rodino notification requires production of documents related to the deliberations by officers and directors. In my experience, these documents are critical to understand deal rationale and may reveal anticompetitive intent. Indeed, we have seen in consumer finance how financial firms can pursue "catch-and-kill" mergers to eliminate competitive threats.[9] However, banking agencies do not specifically or comprehensively require this information.

Third, the federal banking agencies do not provide transparency on the reasons for non-approval. Rather than deny mergers and publish orders describing the rationale for denial, there has been an informal understanding between the regulators and the industry that applicants will be allowed to withdraw their application instead of receiving a denial. Under many, if not most, circumstances, this has struck me as quite inappropriate. But even in cases of withdrawal, the banking agencies do not provide any public communication about the rationale for non-approvals depriving the public and market participants of transparency.

Fourth, the federal banking agencies analyze the "community" factor in ways that are unmoored from the law. More specifically, the regulators typically look to compliance with the Community Reinvestment Act, a statute enacted after the Bank Merger Act, as well as "community benefits agreements" that have serious enforceability challenges that can leave community organizations with little recourse.[10]

Fifth, there is little concrete insight into how federal banking agencies are implementing the 2010 amendments to the bank merger statutes, which specifically requires a consideration of risks to financial stability. For example, the Federal Reserve Board of Governors' order approving Silicon Valley Bank's acquisition of Boston Private provides little transparency about how the agencies considered the factor.[11] Silicon Valley Bank's speedy growth proved to be disastrous, and its failure necessitated extraordinary government support.

Sixth, I was persuaded by the views of various stakeholders that the distinct institutional incentives of the banking agencies have affected their approach to merger review. For example, the issue of "charter flipping," whereby regulators seeking to attract a charter and the associated fees, and supervisory expansion, may lead to a race to the bottom. In addition, other agency responsibilities, such as the conduct of monetary policy, may be a higher priority or otherwise be in tension with requirements to carefully assess merger applications.

Seventh, the application review process is unnecessarily long. Specifically, during the review process, applicants are asked for information and data that could more easily be requested in the initial application. Longstanding Department of Justice protocols sometimes include an analysis of potential "fixes" to a merger through highly unusual letter agreements with merging parties, even when the banking agencies had not completed their assessment of other statutory factors. A quick denial may be better for the agencies, the acquiring bank, and the target bank, compared to an interminable bureaucratic journey.

Finally, the banking agencies rely on remedial provisions and conditions that fail to remedy harm. For example, when ordering divestitures, agencies have frequently permitted merging parties to divest assets many months after the transaction's closing. This gives plenty of time for the merging parties to sabotage their future competitor.

## The Rubber Stamp is Out of Ink

The FDIC's proposed Bank Merger Act Policy Statement would bring analytical rigor to merger review and better align the agency's framework with the statute. I'll highlight some key elements of the proposal, focusing primarily on the competitive effects, convenience and needs, and financial stability factors.

### Competitive Effects

First, the policy statement makes clear that the agency's competitive effects analysis will go beyond the traditional focus on local deposit markets to dig deeper into the deal rationale

and market dynamics.

A narrow analysis of deposit market shares in local communities can miss many dimensions of competition across geographies, product markets, and customer segments. For example, a merger between two banks that are major commercial lenders to midsized businesses in a regional economy could substantially lessen competition. Similarly, a merger between banks that compete nationally in a concentrated consumer credit market could substantially lessen competition. Both transactions might look relatively harmless at the local deposit market level. More importantly, it's unlikely that these or other competitive harms can be remedied through cookie-cutter orders requiring branch divestitures.

The policy statement embraces a comprehensive view of competition. The agency will look at potential impacts on competition locally, regionally, and nationally. It would also look at relevant product markets beyond deposits and analyze the impact of the transaction on different customer segments, with an eye towards ensuring customers retain meaningful choice in relevant markets.

The competitive analysis will be bolstered by the revisions to the FDIC's Supplement to the Interagency Bank Merger Act Application Form. Notably, the agency will require production of the analyses of the deal conducted for the banks' directors and officers, either internally or by third-party investment bankers or consultants.

The policy statement moves away from the permissive approach to post-closing divestiture remedies. When mergers are conditioned by divestitures, there will be significant attention to ensure that buyers of divested assets can successfully replace competition lost by the transaction. For example, as the FDIC required in the merger of Umpqua and Columbia, the merged firm first divested branches to smaller banks and was prohibited from enforcing noncompete agreements against relevant employees.

## Convenience and Needs

Second, the policy statement restores the robust public interest review that Congress intended when requiring the agency to consider the merger's impact on "the convenience and needs of the community to be served."

U.S. law has long treated banks as essential infrastructure and has incorporated certain aspects of public utility oversight. The convenience and needs language itself stems from the "public convenience and necessity" tests associated with telecommunications, energy, and other utility frameworks dating back to at least the 1800s in the U.S. As a result, banks' ability to merge must be directly tied to the interest of the communities they serve.

Over time, the agencies generally used banks' Community Reinvestment Act rating, which is assessed individually and is based on past performance. The policy statement makes clear that the convenience and needs test is a forward-looking analysis as to whether the combined bank will better serve the community than the individual banks did prior to the proposed merger.

Consultant-drafted puffery regarding how savings will trickle down to families and small businesses will not suffice. Applicants will need to provide specific and forward-looking information as to how the community will be better off. As part of the review, the agency will evaluate branch closures for at least a three-year window. Any material negative impact on consumers' access to branches, especially in low- and moderate-income communities, is generally inconsistent with satisfying this factor.[12]

In addition, the agency will carefully evaluate the banks' compliance records, especially with respect to consumer law. The agency will consult with the relevant state and federal authorities, including the CFPB. Repeat offenders of consumer protection and fair dealing laws will face a steep climb to satisfy this factor.

If banks make certain forward-looking projections or representations to the agency in the application to demonstrate satisfaction of the convenience and needs factor, the policy statement asserts that the agency may place such representations in any approval order and supervise the entity for compliance.[13]

The policy statement also makes clear that there is a high bar for any positive finding on the convenience and needs factor to overcome an adverse finding on the competitive effects factor.

### Financial Stability

Finally, the FDIC is proposing to add a section to the policy statement that describes the agency's financial stability analysis.

The policy statement, for the first time, describes how the agency would evaluate whether the transaction could materially increase risks to financial stability. The agency would conduct a careful review of the bank's combined size, interconnectedness, complexity, cross-border activities, resolvability, and critical services provided. Significant transactions involving or resulting in a bank with $100 billion or more in assets will receive heightened scrutiny. Roughly 36 of the 4,500 banks in the U.S. are above this threshold. By codifying this, boards of directors and management at large firms can understand that the likelihood of approval of megamergers will be low.

As we saw with Silicon Valley Bank's failure, the agency will also evaluate the potential for contagion in the event of the combined firm's failure. I also want to note the policy statement's discussion that the combined bank's current regulatory framework, or the fact that it will grow into a more stringent framework, does not automatically mean that financial stability concerns are ameliorated.

I am looking forward to ongoing input on the policy statement and the merger review process.

## Further Areas for Reform

Of course, there are certain areas where we would benefit from further reform. Here are just a few:

First, given the unique role federally insured depository institutions play in the economy, Congress and the regulators should consider broader adoption of size and growth caps. There is a strong case to be made that given the critical role that entrepreneurs and small businesses play in our economy and the vast geography of our nation, the U.S. benefits more from having a large number of small and midsized banks, rather than a market structure with just a handful of very large banks, like in Europe and China. Existing law already includes some statutory caps, and it may be worthwhile to strengthen them.

Second, we should fix the failing bank exception to existing merger prohibitions. For example, under ordinary circumstances, JPMorgan Chase would be ineligible to purchase First Republic Bank, absent this exception. It makes little sense to allow such an acquisition unless there are no other willing bidders or no other means of executing an orderly winddown.[14]

Third, we should address the chaos that consumers can face through a merger. Over the years, the CFPB has observed significant consumer challenges, such as the inability to access funds or key account information, after a merger or acquisition. I've also observed that consumer law violations often have their roots in botched mergers.

Finally, to level the playing field and reduce concentration creep, we should continue to reduce the "too big to fail" subsidy. Banking organizations that are already large want to grow even bigger to enjoy these benefits, such as the perception that they can provide free, unlimited deposit insurance, an issue that came to the forefront in last spring's bank failures. There are many ways under existing law to reduce these subsidies to ease the pressure to consolidate.[15] Congressional action to expand deposit insurance coverage would also help smaller and midsized banks that are not perceived to be too big to fail.

Modernizing our merger review framework is an important step, though it will do little to undo the harms from the permissive, pro-merger policy posture of recent decades. Given how essential banking is to the functioning of our economy and our society, we must continue to pursue actions to promote a dynamic, fair, and competitive system.

## Footnotes

1.https://www.chicagofed.org/publications/economic-perspectives/2000/1qepart1. (https://www.chicagofed.org/publications/economic-perspectives/2000/1qepart1. ) For example, total deal value for mergers in 1990 was $185 billion. That figure jumped to $500 billion in 1995.

2. https://news.gallup.com/poll/3862/many-americans-personal-experience-bank-mergers-1990s.aspx (https://news.gallup.com/poll/3862/many-americans-personal-experience-bank-mergers-1990s.aspx. )

3. For a comprehensive literature review of empirical harms, and an analysis of the weaknesses of bank merger review over the past several decades, see https://scholarship.law.duke.edu/dlj/vol72/iss3/1 (https://scholarship.law.duke.edu/dlj/vol72/iss3/1/)

4. https://www.consumerfinance.gov/data-research/research-reports/credit-card-data-small-issuers-offer-lower-rates/ (https://www.consumerfinance.gov/data-research/research

-reports/credit-card-data-small-issuers-offer-lower-rates/. )

5. https://www.justice.gov/opa/pr/antitrust-division-seeks-additional-public-comments-bank-merger-competitive-analysis (https://www.justice.gov/opa/pr/antitrust-division-seeks-additional-public-comments-bank-merger-competitive-analysis)

6. For simplicity, these remarks do not distinguish between the Federal Reserve Board of Governors' review of bank holding company mergers under the Bank Holding Company Act and the banking agencies' review of insured depository mergers under the Bank Merger Act. The statutes have very similar statutory factors and the implementing frameworks have suffered from similar deficiencies.

7. The agencies may approve a transaction if the anticompetitive effects 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. There is no exception when the transaction would result in a monopoly or would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in the United States.

8. For example, see the competitive effects analysis in the Federal Reserve Board of Governors' 2004 approval of the Bank of America-FleetBoston merger, https://www.federalreserve.gov/boarddocs/press/orders/2004/20040308/attachment.pdf (https://www.federalreserve.gov/boarddocs/press/orders/2004/20040308/attachment.pdf), (pp. 12-16). Even in cases where this cursory review raised red flags, the agencies would often bend over backwards to explain away the concern or resort to largely ineffective local branch divestitures. For example, see the competitive effects analysis and remedies in the Federal Reserve Board of Governors' 2016 KeyCorp-First Niagara merger approval and the FDIC's BB&T-SunTrust approval order, https://www.federalreserve.gov/newsevents/pressreleases/files/orders20160712a1.pdf (https://www.federalreserve.gov/newsevents/pressreleases/files/orders20160712a1.pdf), (pp.6-11); https://www.fdic.gov/news/press-releases/2019/pr19111a.pdf (https://www.fdic.gov/news/press-releases/2019/pr19111a.pdf), (pp.4-6).

9. See for example, https://www.justice.gov/opa/pr/justice-department-sues-block-visas-proposed-acquisition-plaid (https://www.justice.gov/opa/pr/justice-department-sues-block-visas-proposed-acquisition-plaid).

10. For example, see the convenience and needs analysis in the FDIC's approval order of the BB&T-SunTrust merger. https://www.fdic.gov/news/press-releases/2019/pr19111a.pdf (https://www.fdic.gov/news/press-releases/2019/pr19111a.pdf) (pp. 8-10)

11. https://www.federalreserve.gov/newsevents/pressreleases/files/orders20210610a1.pdf (https://www.federalreserve.gov/newsevents/pressreleases/files/orders20210610a1.pdf) (pp. 17-18)

12. To avoid a bait and switch, it would make sense to add a condition to approval orders restricting the ability of banks to close branches beyond those listed in the application.

13. The agency should be cautious about relying on behavioral remedies, such as time-bound pledges and commitments, of course.

14. While there is a failing bank carveout under the Riegle-Neal Act's size cap, existing law still allows the primary federal banking agency to deny a bidder's acquisition under the Bank Merger Act.

15. For a discussion of the traditional banking law levers that have an antimonopoly nexus, see https://www.yalelawjournal.org/essay/banking-and-antitrust (https://www.yalelawjournal.org/essay/banking-and-antitrust).

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