

United States House of Representatives
Committee on Financial Services
2129 Rayburn House Office Building
Washington, D.C. 20515

December 21, 2021

The Honorable Jelena McWilliams
Chairman
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, D.C. 20429

Chairman McWilliams:

I write to express my concern regarding your attempts to apparently disavow and block a sensible Request for Information (RFI) approved by a majority of the Federal Deposit Insurance Corporation's (FDIC) Board of Directors regarding the agency's outdated rules, regulations, guidance, and statements of policy on bank merger transactions.¹ Moreover, despite the bipartisan support for promoting competition and the need to modernize outdated bank merger review procedures that, at a minimum, do not reflect current law, I am disappointed that you would seek to deny the public an opportunity to provide their feedback on ways the FDIC's bank merger review procedures could be strengthened as envisioned by the Board. Accordingly, I ask that you promptly cite the legal authority and provide any legal analysis that you are relying on in your attempt to unilaterally block the will of the majority of the FDIC Board to carry out the agency's responsibilities. I also ask that you reconsider your position on this matter, and that you instead collaborate with your FDIC Board Members and other regulators to promote competition by improving FDIC's outdated bank merger review process for the benefit of the public.

On December 7, 2021, Director Rohit Chopra sent a letter to FDIC's General Counsel that describes in detail the legal basis, pursuant to the Federal Deposit Insurance Act and the FDIC's bylaws, that a majority of the FDIC Board can act on a matter such as this RFI, even if the FDIC Chairman is opposed to the matter.² There have been rare instances where Congress has stipulated that the affirmative vote of a chair of a multimember board is required for that board to act. For example, in Section 113 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Congress stipulated that the Chairperson of the Financial Stability Oversight Council (FSOC) is required to vote in the affirmative for FSOC to designate a nonbank financial company for enhanced supervision if it poses a threat to U.S. financial stability.³ However, there appears to be no similar stipulation requiring that the FDIC Chairman vote in the affirmative for a majority of the FDIC Board to act, nor does the statute give the FDIC Chairman the authority to veto an action taken by a majority of the FDIC Board.

¹ [Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions](#) (Dec. 9, 2021). Also see Joint Statement of Martin J. Gruenberg and Rohit Chopra, Members, FDIC Board of Directors, [Request for Public Comment on the Bank Merger Act](#) (Dec. 9, 2021); Rohit Chopra, [How Should Regulators Review Bank Mergers?](#) (Dec. 9, 2021); and OCC, [Acting Comptroller Issues Statement on RFI on Bank Mergers](#) (Dec. 14, 2021).

² Politico, [FDIC heads for further battles on Biden agenda](#) (Dec. 14, 2021).

³ 12 USC 5323

FDIC’s Statement of Policy on Bank Merger Transactions and related rules regarding bank merger transactions do not reflect the fact that more than a decade ago, Congress amended the law through the Dodd-Frank Act to require banking regulators to consider “the risk to the stability of the United States banking or financial system” of a proposed bank merger.⁴ While the FDIC considered this financial stability factor when reviewing the merger between BB&T and SunTrust Bank, it utilized a set of quantitative and qualitative metrics that do not appear to be reflected in the agency’s rules or policy on reviewing such merger transactions.⁵ In fact, in approving the merger, Director Gruenberg expressed major misgivings about financial stability, writing that a prospective “failure [of Truist] could well pose a ‘risk to the stability of the United States banking or financial systems.’”⁶ However, the metrics FDIC chose to use in that instance have not been subject to public comment to allow experts, stakeholders, and the broader public to provide the agency with feedback on the benefits or shortcomings of using these metrics or alternatives the agency should consider in implementing the financial stability consideration provision.

Following a 2018 deregulatory rollback of the Dodd-Frank Act’s enhanced prudential framework that applies to the largest banks, and as experts warned would happen in its aftermath, we have seen an acceleration of proposed and approved mergers in recent years creating even larger banks—including mergers of BB&T with SunTrust, First Citizens with CIT, and U.S. Bank with MUFG Union Bank.⁷ Unfortunately, there is evidence that regulators’ rates of approving pending merger applications has accelerated, even as the trend of large regional bank consolidation has picked up at a concerning pace.⁸ Communities directly affected by bank consolidation need access to financial services in order to recover from the pandemic, and we need a bank merger review framework that takes into account these dynamics.

As you may recall, I raised the topic when you first testified before the Committee on May 16, 2019, and I questioned you with respect to the FDIC’s public hearings of the pending merger of BB&T and SunTrust.⁹ I raised these issues again in a letter to President-elect Biden last December, urging his Administration and appointees to strengthen merger and anti-trust reviews by the government, including to ensure that potential systemic risk issues are fully considered.¹⁰ In July, President Biden issued an executive order promoting a government-wide effort to promote

⁴ See footnote 6 from the Joint Statement of Martin J. Gruenberg and Rohit Chopra, Members, FDIC Board of Directors, [Request for Public Comment on the Bank Merger Act](#) (Dec. 9, 2021) (“12 CFR part 303, available at <https://www.fdic.gov/regulations/laws/rules/2000-250.html> and 63 FR 44762, August 20, 1998, effective October 1, 1998; amended at 67 FR 48178, July 23, 2002; 67 FR 79278, December 27, 2002; and FDIC Statement of Policy on Bank Merger Transactions, 73 FR 8871, February 15, 2008, available at <https://www.fdic.gov/regulations/laws/rules/5000-1200.html>.”)

⁵ FDIC, [Order and Basis for Corporation Approval – BB&T and SunTrust](#) (Nov. 19, 2019).

⁶ FDIC, [Statement by Martin J. Gruenberg](#), (Nov. 19, 2019).

⁷ For example, see CNBC, [Bank mergers will ‘absolutely’ accelerate thanks to regulation rewrite, predicts analyst Mike Mayo](#) (Mar. 16, 2018); The Intercept, [Bill Aimed at Saving Community Banks Is Already Killing Them](#) (May 16, 2018); and Jeremy Kress, [Biden wants to rein in bank mergers — that could help consumers and the economy](#) (Jul. 28, 2021).

⁸ For example, see Jeremy C. Kress, [Modernizing Bank Merger Review](#), (2019); Testimony from [Desiree Jackson](#), Assistant Vice President for Treasury Management, Beneficial State Bank, and [Paulina Gonzalez-Brito](#), Executive Director, California Reinvestment Coalition at the House Financial Services Committee (FSC) hearing, [The Future of Banking: How Consolidation, Nonbank Competition, and Technology are Reshaping the Banking System](#) (Sep. 29, 2021). Also see FSC hearing, [Promoting Inclusive Lending During the Pandemic: Community Development Financial Institutions and Minority Depository Institutions](#) (Jun. 3, 2020).

⁹ FSC hearing, [Oversight of Prudential Regulators: Ensuring the Safety, Soundness and Accountability of Megabanks and Other Depository Institutions](#) (May 16, 2019).

¹⁰ FSC, [Waters Provides Recommendations to President-Elect Biden on Trump Actions to Reverse](#) (Dec. 4, 2020).

competition, including by encouraging the bank merger review process to be strengthened,¹¹ and I was pleased to get reports that the Federal Reserve and FDIC were finally taking action, something I underscored in my letter to you and other regulators last week.¹²

Improving the bank merger review process has been a bipartisan effort. In response to a letter I sent Fed Chair Powell on the matter, he wrote, “The Board takes seriously its statutory responsibility to review bank mergers and we are committed to maintaining robust and effective standards that help meet the needs of communities and promote a stable financial system. As contemplated by President Biden’s July 9, 2021 Executive Order, I look forward to coordinating with the Attorney General and the heads of other federal banking agencies to explore ways to further enhance our bank merger framework to ensure it promotes competition, innovation, and consumer choices.”¹³ Additionally, in a February 2021 speech, Federal Reserve Governor Michelle Bowman said, “Technological developments and financial market evolution are quickly escalating competition in the banking industry, and our approach to analyzing the competitive effects of mergers and acquisitions needs to keep pace. The Board’s framework for banking antitrust analysis hasn’t changed substantially over the past couple of decades. I believe we should consider revisions to that framework that would better reflect the competition that smaller banks face in an industry quickly being transformed by technology and non-bank financial companies. As part of this effort, we have engaged in conversations and received feedback from community banks about the Board’s competitive analysis framework and its impact on their business strategies and long-term growth plans. We are in the process of reviewing our approach, and we are specifically considering the unique market dynamics faced by small community banks in rural and underserved areas.”¹⁴

I appreciate these efforts by Fed Chair Powell, Fed Governor Bowman, and your fellow FDIC Board Members to advance overdue bank merger review reforms, but I’ve been disappointed to see my Republican colleagues single out the actions taken by a majority of the FDIC Board members as a “power grab”,¹⁵ a “coup”,¹⁶ and the “odious destruction of political norms”,¹⁷ apparently because the majority of an independent agency’s board is seeking the public’s feedback on strengthening its bank merger review process that the Chairman opposed, including ensuring the FDIC’s procedures reflect current law. However, it is striking that my Republican colleagues have yet to launch similar attacks against two Republican members of the National Credit Union Administration (NCUA) Board who recently voted to finalize a rule while NCUA’s Chairman voted no.¹⁸ Conversely, instead of accepting a similar action by your fellow Board members as legitimate, it appears you are taking unprecedented actions to prevent a majority of an independent regulatory agency to carry out its statutory duties. Instead of impugning the motives of your fellow FDIC Board members by characterizing their efforts to seek public input on how the FDIC

¹¹ Federal Register, [Executive Order 14036 - Promoting Competition in the American Economy](#) (Jul. 9, 2021). Also see White House, [FACT SHEET: Executive Order on Promoting Competition in the American Economy](#) (Jul. 9, 2021).

¹² FSC, [Waters Calls on Fed, FDIC, and OCC to Halt Mergers and Acquisitions Over \\$100 Billion](#) (Dec. 10, 2021).

¹³ Letter from Fed Chair Jay Powell to FSC Chairwoman Maxine Waters (Sep. 24, 2021).

¹⁴ Fed Governor Michelle Bowman, [My Perspective on Bank Regulation and Supervision](#) (Feb. 16, 2021)

¹⁵ FSC Republicans, [Committee Republicans Launch Investigation into Unprecedented Attempted Power Grab by Democrats on the FDIC Board of Directors](#) (Dec. 14, 2021).

¹⁶ Senate Committee on Banking, Housing, and Urban Affairs, [Toomey Statement on Chopra’s Illegitimate FDIC Coup](#) (Dec. 9, 2021).

¹⁷ *Id.*

¹⁸ NCUA, [NCUA Board Approves Final Rules on CUSOs and CAMELS Rating System, Briefed on Cybersecurity](#) (Oct. 21, 2021)

implements the law as a “hostile takeover”,¹⁹ I strongly urge you to reconsider your position on this matter, and that you collaborate with your FDIC Board Members and other regulators to promote competition by improving FDIC’s outdated bank merger review process for the benefit of the public.

To help the Committee carry out its oversight responsibilities, I ask that you provide a written response – as well as all related documents, including where applicable, all legal analyses – to the following questions:

1. Did you, or any of your senior staff, order the issuance of the December 9, 2021 press release on FDIC’s website entitled “FDIC Statement on CFPB Statement”,²⁰ which anonymously disavowed the RFI on bank merger transaction reviews posted on CFPB’s website and claimed that it was not approved by the FDIC, despite being aware that the document was previously circulated to members of the FDIC Board,²¹ and that a majority of the FDIC Board voted in the affirmative to issue it?²² If so, please cite the statutory or regulatory basis for doing so and provide any relevant legal analysis or case law.
2. At the FDIC’s meeting on December 14, 2021, you ruled out of order a request by FDIC Board Members to have the notational vote, NV2021-12, be recorded in the minutes pursuant to the FDIC’s bylaws.²³ Please cite the statutory or regulatory basis you relied upon and provide any relevant legal analysis or case law that supports your actions.
3. As noted above, Fed Chair Powell wrote that he would be coordinating with the heads of other federal banking agencies and the Department of Justice to explore ways to enhance the bank merger review framework pursuant to President Biden’s Executive Order. Please describe what actions you and/or any of your senior staff have taken to respond to the President’s Executive Order to enhance the bank merger review framework. Please also provide a list of any internal or external meetings held, and a list of any conversations you have had with Fed Chair Powell, OCC, Department of Justice, and your fellow FDIC Board Members. to respond to the President’s Executive Order on this matter.
4. You have been Chairman of the FDIC since June 5, 2018. Please detail what steps you have taken during your tenure to ensure the agency’s rules and statements of policy appropriately reflect current law, including with respect to the FDIC Statement of Policy on Bank Merger Transactions.
5. To the extent you agree that the FDIC should have rules and statements of policy appropriately reflect current law, and that the FDIC should consider revisions to its bank merger review framework to take into account what Fed Governor Bowman described as

¹⁹ Jelena McWilliams, [A Hostile Takeover of the FDIC](#), Wall Street Journal (Dec. 15, 2021).

²⁰ FDIC, [FDIC Statement on CFPB Statement](#) (Dec. 9, 2021).

²¹ CFPB, [Statement of CFPB Director Rohit Chopra Member, FDIC Board of Directors December Open Meeting of the Board](#) (Dec. 14, 2021).

²² Joint Statement of Martin J. Gruenberg and Rohit Chopra, Members, FDIC Board of Directors, [Request for Public Comment on the Bank Merger Act](#) (Dec. 9, 2021); Rohit Chopra, [How Should Regulators Review Bank Mergers?](#) (Dec. 9, 2021); and OCC, [Acting Comptroller Issues Statement on RFI on Bank Mergers](#) (Dec. 14, 2021).

²³ FDIC, [Meeting Agenda](#) and [Video Archive](#) (Dec. 14, 2021).

“the competition that smaller banks face in an industry quickly being transformed by technology and non-bank financial companies,” what process and actions do you propose that the FDIC undertake to strengthen its outdated rules, regulations, guidance, and statements of policy on bank merger reviews and how soon can the public expect the FDIC to begin and complete that process?

6. If you agree the FDIC should strengthen its bank merger review framework, especially to ensure the agency is adequately accounting for financial stability as is required by law, will the FDIC pause in approving large bank mergers until your review framework is updated?

Please provide written responses to these questions by January 21, 2022. It is my sincere hope you will stop these obstructionist acts and join the bipartisan efforts underway to strengthen the bank merger review process to ensure it is being conducted in the best interests of workers, consumers, and communities throughout the country. I look forward to your prompt response.

Sincerely,



MAXINE WATERS
Chairwoman

cc: The Honorable Patrick McHenry, Ranking Member