STATEMENT OF

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Enhancing Competition: Shaping the Future of Bank Mergers and De Novo Formation

Biography

Amanda K. Allexon is a Partner in Simpson Thacher's Financial Institutions Practice. Based in Washington, D.C., Ms. Allexon advises domestic and foreign banks, bank holding companies, other regulated financial institutions and investors on the full spectrum of transactional, governance, regulatory and supervisory matters. In addition to her private practice experience, Ms. Allexon worked in the Legal Division of the Federal Reserve Board for nearly a decade, including serving as Senior Counsel. During her time at the Federal Reserve, she evaluated merger and acquisition applications subject to review under the Bank Holding Company Act, Home Owners' Loan Act, Bank Merger Act, Change in Bank Control Act and Federal Reserve Act, and other applications and interpretive issues under these statutes. Ms. Allexon was a primary Federal Reserve contact for matters related to extensions of credit by banks to their insiders (Regulation O), regulation of holding companies (Regulation Y and LL), and matters related to the control of depository institutions and holding companies. Ms. Allexon also assisted the transition of savings and loan holding companies to Federal Reserve supervision and rules after the financial crisis, reviewed and established key policies related to control and private equity investments in bank holding companies, and served as a liaison to the U.S. Treasury related to post-crisis investments in banks.

Prior to joining the Legal Division, Ms. Allexon served as a Legislative Assistant to Representative James A. Leach, Chairman of the Banking Committee. Ms. Allexon was responsible for the development, drafting and advocacy of legislative initiatives related to banking, housing and tax.

Chairman Barr, Ranking Member Foster and Honorable Members of the Subcommittee, thank you for having me here today to discuss the bank applications process. My name is Amanda Kueter Allexon and I am a partner at Simpson Thacher & Bartlett LLP, where I represent domestic and foreign banks, bank holding companies, other regulated financial institutions and investors of all sizes on bank regulatory matters, including mergers and acquisitions. I am here today in my individual capacity and my views do not necessarily represent those of Simpson Thacher or any client. My perspective on bank mergers and de novo formations is somewhat unique because of my background. In addition to my years in private practice, I began my career almost 25 years ago as a Legislative Assistant for Chairman James A. Leach with respect to banking matters in this very room. I also spent almost 10 years in the Legal Division of the Board of Governors of the Federal Reserve System, including through the Great Financial Crisis.

The diversity in business models is one of the strengths of the banking system in the United States. In 2025, customers have more choices than ever with respect to where and how they bank. There are large, midsize and community banks, online-only banks and fintechs, credit unions, and nonregulated financial services providers. Customers can have access to financial services through any or all of these options. No other major country has this level of variety in its banking market. If we want to maintain this diversity there must be a reasonable ability for parties to both enter <u>and</u> exit geographic and product markets, as well as engage in business combinations that enhance their competitive impact.

Another feature of our banking system is that it is in constant transition. Although some like to make comparisons, the banking system we have today is simply not the same as it was five years ago, much less 30 years ago, and there is no going back. The banking system we enjoy today will likely look different five years from now as technology continues to evolve and more dynamic customer driven banking products and delivery methods continue to be developed.[1] Keeping up with this changing environment requires a continuous stream of new market entrants, the ability to engage in business combinations that give room for investment and innovation, as well as the ability for organizations to exit the market through a strategic sale if that is the best option.

As we all know, the number of de novo bank formations has decreased to a trickle since the Great Financial Crisis.[2] There are a number of reasons why we are not seeing healthy de novo formation activity. Based on an underlying assumption that de novo banks present an increased risk of failure,[3] the regulatory expectations for de novos have increased dramatically across the board to the point where applicants must somehow proactively establish that the proposal presents little to no risk. In addition, exceedingly long time periods for receiving regulatory approval turn off potential new entrants or force alternative structures to avoid costly extended review, such as acquiring a small existing bank. These factors combined with the increased day-

[1] The *FDIC National Survey of Unbanked and Underbanked Households* also reports that half of all banked households use mobile banking as their primary method of bank account access in 2023 and that half of all households use nonbank online payment services.

[2] More than 1,000 new banks formed between 2000 and 2008. The FDIC has granted deposit insurance to 117 entities since 12/31/2008. This number includes shelf charters, spin-offs and entities that did not open for business. https://www.fdic.gov/bank-examinations/decisions-bank-applications-deposit-insurance.

[3] *See* https://www.fdic.gov/bank-examinations/de-novo-banks-economic-trends-and-supervisory-framework.

to-day costs of competing in the modern business of banking are difficult for many to overcome. On top of that, many of the new and more dynamic business models seeking to enter the regulated banking space cannot because their ownership structures are not compatible with Bank Holding Company Act limitations.[4] This has created a system of haves and have nots, those that are regulated and those that are not. As with any dynamic system, these two halves are finding synergies through various levels of partnerships but much thought must be given to how these two halves will coexist in the long term.

We have also seen a marked slowdown in bank merger activity.[5] The economic environment over the past several years and the bank failures in the spring of 2023, together with policy choices of the previous administration created material headwinds to what would otherwise be healthy merger activity. The previous administration had expressed a general level of distrust of the processes long used in considering merger applications, concern with respect to perceived concentrations within the banking industry, the impact of size on financial stability, as well as the impacts of mergers on local communities and customers. These concerns manifested in the revised bank merger policy statements issued by the Office of the Comptroller of the Currency (the "OCC") and the Federal Deposit Insurance Corporation (the "FDIC"), as well as the Department of Justice's (the "DOJ") formal withdrawal from the 1995 joint Bank Merger Guidelines.[6] Others are concerned about the lack of transparency and processing times related to bank merger transactions and de novo licensing.

The question before us is how we can maintain the strength and diversity of our banking system through de novo charters and bank mergers, which, if approached properly, can bring new capital and entrants into markets and create more effective competitors in others, while also

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[4] The Bank Holding Company Act of 1956 (the "BHC Act") requires a company that directly or indirectly "controls" a "bank" (within the meaning of the BHC Act) to register as a bank holding company ("BHC") and receive the prior approval of the Federal Reserve. 12 U.S.C. §§ 1841(a), 1842(a). BHCs are subject to significant restrictions on their business activities and investments, and are generally prohibited from engaging in non-banking commercial activities. 12 U.S.C. § 1843. BHCs and their affiliates (including nonbank affiliates) are also subject to comprehensive regulation and supervision on a consolidated basis by the Federal Reserve. In particular, BHCs are subject to regular examination, reporting requirements, capital and other material supervisory standards, as well as a requirement to serve as a source of financial strength to any controlled bank.

[5] The average number of banking institution mergers and acquisitions from 2012 to 2019 was approximately 265 per year. By comparison, from 2020 to 2025 (on an annualized basis), the average number of banking institution mergers and acquisitions has dropped to approximately 145 per year, a decrease of approximately 45%. *Source*: S&P Capital IQ (as of May 9, 2025). Includes all announced mergers, whether or not completed, in which the target institution is a regulated banking organization, but excludes government-assisted acquisitions of failed banks and acquisitions of credit unions.

[6] For additional discussion on each of these actions, see: OCC, FDIC and DOJ Finalize Changes to Their Bank Merger Review Processes (https://www.stblaw.com/about-us/publications/view/2024/09/19/occ-fdic-and-doj-finalize-changes-to-their-bank-merger-review-processes); FDIC Proposes Changes to Its Bank Merger Review Process (https://www.stblaw.com/about-us/publications/view/2024/03/22/fdic-proposes-changes-to-its-bank-merger-review-process); OCC Proposes Changes to Bank Merger Review Process (https://www.stblaw.com/about-us/publications/view/2024/01/31/occ-proposes-changes-to-bank-merger-review-process); Provident/Lakeland Approvals Highlight Agency Divergence on Bank Merger Transactions (https://www.stblaw.com/about-us/publications/view/2024/04/16/provident-lakeland-approvals-highlight-agency-divergence-on-bank-merger-transactions); DOJ's Antitrust AAG Kanter Announces New Approach to Antitrust Enforcement in Bank Mergers (https://www.stblaw.com/about-us/publications/view/2023/06/21/doj-s-antitrust-aag-kanter-announces-new-approach-to-antitrust-enforcement-in-bank-mergers).

acknowledging the critical importance of the application review process and the required statutory factors for review. I have a few thoughts.

Impact of Bank Merger Guidelines on Competition

Preserving market competition was a core purpose behind the Bank Merger Act and the appropriate balance between the competitive factor and the other statutory factors was hotly debated at the time of enactment.[7] At that time, banking was a deeply local business and the competitive factor was formulated with that in mind. In coming to the current statutory language, Congress attempted a "balancing of favorable and unfavorable banking factors with favorable and unfavorable competitive factors, with no one of them being overlooked and no one of them being controlling."[8]

Prior to the DOJ's withdrawal from the 1995 Bank Merger Guidelines in September 2024, the DOJ and the banking agencies applied a relatively similar analytical framework for analyzing competitive effects, which utilized predictable screens and safe harbors using market share calculations based on local deposits and branch overlaps.

In formally withdrawing from the 1995 Bank Merger Guidelines, DOJ made clear that going forward it would be applying its general 2023 Merger Guidelines, thereby expanding its bank merger analysis beyond the traditional assessment of HHI screens based on deposits and instead applying a much broader framework that would consider additional factors including the impact on discrete lines of business, particular customer segments and service quality. While DOJ stated, when announcing its withdrawal from the 1995 Bank Merger Guidelines, that the withdrawal was the result of collaborative consultations with the Federal Reserve, FDIC and OCC, none of the banking agencies went so far as to state that they would also be completely abandoning the 1995 Bank Merger Guidelines.

Recent transactions suggest that the federal banking agencies are continuing to rely heavily on the traditional methodology from the 1995 Bank Merger Guidelines of calculating market shares based on branch deposit data, and using the safe harbors set out in those Guidelines.[9] It remains to be seen, particularly for more traditional brick-and-mortar retail bank transactions, if the DOJ's differing analytical approach will result in any materially divergent outcomes, or if the DOJ will adhere more closely to a more traditional approach when assessing regional or community bank mergers, notwithstanding the broader analytical tools available within its 2023 Merger Guidelines.

In any case, real effort must be made to modernize the analytical methods under which bank combinations are reviewed for competitive purposes. While the historic approach does include predictable screens, it does not readily include other non-bank participants or online competitors,

[7] Traber, Martin A. (1969) "Legislative History of the 1960 Bank Merger Act and its 1996 Amendment: Judicial Misuse and a Suggested Approach," Indiana Law Journal: Vol. 44: Iss. 4, Article 4. Available at: https://www.repository.law.indiana.edu/ilj/vol44/iss4/4.

[8] 106 Cong. Rec. 7257, 9712 (1960).

[9] *See, e.g.,* Capital One Financial Corporation, FRB Order No. 2025-10 (April 18, 2025); Renasant Corporation, FRB Order No. 2025-07 (March 14, 2025); Provident Financial Services, Inc., FRB Order 2024-02 (April 11, 2024).

which are major competitive forces in today's financial services environment.[10] As a result, market share can be over or under weighted depending on the geography. The major hurdle to this modernization is access to measurable data. This issue is well known but understandably is not a priority for any of the banking agencies and is a major challenge to coordinate on an interagency basis. As a result, transactions that will result in stronger banking organizations that can offer a wider array of products and services are routinely adversely impacted by the limitations of the current approach.

Applications Processing

Many straight forward merger transactions are processed in the normal course within a few months under standard processing procedures.[11] However, too many transactions languish well beyond the normal processing periods. A growing number of merger transactions have been caught up in reviews that can take a year or more, which exposes both parties to escalating risk as delays mount.[12] De novo applications routinely take years to wind their way through the review process. These timelines are extremely difficult for any businesses to function within. Deals that were struck a year ago may no longer make sense. Employees may leave and critical IT systems upgrades may be deferred as a result of uncertainty.

As someone who has spent material time on both sides of application processing, I can tell you that there have been a few key reasons why applications experience delays. I would opine that most all of these can be readily addressed through thoughtful action by the federal banking agencies, although targeted legislative actions may also be helpful.

1. *Modernizing Internal Procedures*

A number of otherwise straight forward transactions are held up by outmoded or misused agency procedures.

Complete Applications and Clock Tolling

The federal banking agencies must act on applications within more established and binding time periods. Each of the federal banking agencies has a slightly different way of acknowledging an application and determining when it is informationally complete. This procedural threshold is important because it triggers statutory and regulatory timelines within which the agency must act. While agencies will acknowledge receipt of an application upon filing, an application is not

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[10] *See* https://home.treasury.gov/system/files/136/Assessing-the-Impact-of-New-Entrant-Nonbank-Firms.pdf.

[11] The Federal Reserve publishes aggregate data that summarized the number and types of applications it processes as well as the average and median processing time. https://www.federalreserve.gov/publications/semiannual-report-on-banking-applications-activity.htm. The FDIC and the OCC both maintain public databases of applications received and action dates.

[12] The baseline processing period for applications has increased over the past 10 years. In 2014, the Federal Reserve took on average 53 days to process applications that did not receive a public comment. This number has climbed steadily to 85 days in the second half of 2023. As discussed further below, if an application receives a public comment, the average processing period increases dramatically. Although it varies by year, the Federal Reserve has taken on average between 160 and 260 days to process merger and acquisition applications that received a public comment over the past ten years.

considered "substantially complete" until months into processing. This can push out the date for required action depending on when the last piece of relevant information was received.[13] This Committee has already correctly identified that this subjectivity renders the statutory and regulatory time periods practically moot. Without any sense of urgency or accountability, it is easy for the application process to develop into somewhat of a black hole or for an application to simply take a back seat to other more pressing agency matters.

It will take dedicated and consistent effort by agency leadership and staff to remedy this issue over the long term. Although one can debate the timeline selected, a potentially effective method for increasing agency discipline on this issue may be found in the FDIC's policy adopted in June 2024, which requires any application that has spent 270 days awaiting approval to automatically be put on the discussion agenda for the FDIC's next board meeting.

While I am generally supportive of legislative efforts to codify more concrete application review timelines in statute, great caution should be used in establishing the procedures and timelines in order to avoid negative unintended consequences. For example, any legislation should be careful to include all statutes that are applicable to the review of a bank merger or de novo application in order to avoid inconsistent timelines under different statutory regimes. Further, any timelines should be practical and not merely aspirational. Congress would not want to set up a procedure where otherwise approvable transactions are denied or turned away simply because it isn't realistic to process them within an impractically short timeframe. Additionally, if the timeline is too short, more of the review process could be pushed into a space outside of the regulatory structure (such as pre-filing reviews or suspensions) or the initial application requirements could be so significantly expanded such that any time saved in processing is lost.

Expedite the Review of Public Comments

One big culprit for long processing periods is how agencies handle comments received during the public comment period. While it is important to consider timely and substantive comments during the applications process, the receipt of a public comment should not add months to processing or immediately trigger heightened agency action.[14] The federal banking agencies should also limit public hearings to transactions that present unique circumstances that cannot be addressed through written comment. Size alone should not be a determinative factor.

The vast majority of public comments raise concerns about branching or the banking organization's level of community engagement. Agency staff are well prepared to review and consider public comments and quickly decide whether they are truly material or present novel and verifiable information not otherwise available to the agency. The federal banking agencies

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[13] 12 U.S.C. § 1842(b)(1); 12 CFR 225.15(c); 12 CFR 225.15(d); 12 CFR 225.16(f); 12 CFR 303.64(a)(2); 12 CFR 303.64(b); 12 CFR 303.64(c).

[14] For example, under the Federal Reserve's rules, an application which otherwise may be delegated to the appropriate Federal Reserve Bank for processing automatically requires the approval of the full Board of Governors if a timely substantive public comment is received. 12 CFR 265.20(c)(12). The Federal Reserve's Semiannual Reports on Banking Applications Activity show that applications that received a public comment take substantially longer to process than compared to applications with no comments. Depending on the year, an application with comments can take between *100 and 300 days longer* than an application with no comment on average. https://www.federalreserve.gov/publications/semiannual-report-on-banking-applications-activity.htm.

routinely examine banks with respect to their compliance with the Community Reinvestment Act and fair lending laws. The applications process should not be used to relitigate these examinations or call into question otherwise reasonable plans for forward-looking compliance without compelling factual evidence. This is wasteful of agency resources and disregards the hard work of the agency staff that conduct those supervisory operations. Simply adjusting agency rules to allow staff to make decisions with respect to which comments are redundant of information already under considerations, which comments can be handled in the normal course of the application review and bank business, and which deserve more detailed consideration, would dramatically reduce application processing periods for a significant number of transactions.

Eliminate Redundancy by Reducing or Streamlining Duplicative Review Processes[15]

Both bank mergers and de novo transactions are reviewed by multiple federal banking agencies. While sometimes there are material reasons for multiple agencies to review a transaction, there are many times when the review is merely duplicative and serves no regulatory purpose. The Federal Reserve could take steps to standardize and make more predictable its current process for waiving applications at the holding company level if there is an underlying Bank Merger Act filing and certain other factors are met.[16] Similarly, the FDIC could establish a procedure to waive or shorten the review of de novo insurance applications if the OCC or the Federal Reserve are also reviewing the transaction. If the OCC or the Federal Reserve (together with the appropriate state banking agencies) determines that a de novo institution can operate in a safe and sound way, it is not clear what additional regulatory purpose is served by the FDIC separately opining on the matter.

2. *Avoid Burden Shifting and Expanding the Factors for Review*

Instead of approaching applications from a neutral position, there has been a growing level of risk aversion within the regulatory space which results in a tendency to view bank related transactions as inherently negative. As discussed above, the U.S. banking system requires a reasonable opportunity for parties to both enter and exit the market, as well as engage in business combinations that enhance their competitive impact. Although it is always the applicant's burden to establish that the statutory factors are satisfied, it is a fundamentally different proposition if you are starting from a neutral position or from a negative one.

In pursuit of creating transparency and certainty in applications processing, the OCC and FDIC bank merger policies issued in 2024 intentionally and unintentionally created presumptions that perpetuated and increased this shift in burden. While some of those indicators were logical and based on long-standing and well understood bank agency policy, the proposals also included some factors not previously articulated by the regulators and that were not based on any measurable data. No matter what the intent or how much the agency conditions terms, once the

[15] Each of the options noted below could also be effectuated through legislative changes.

[16] 12 CFR 225.12(d). The Federal Reserve typically grants these waivers later in the process once they become comfortable that the primary bank regulator is prepared to act. This creates the potential that the Federal Reserve will ask for a full application late in the applications processing period which is a risk that many banking organizations are not willing to take.

words are on paper, they are very difficult to overcome. Presumptions tend to not be rebuttable in practice in the bank regulatory space.

Additionally, there is a tendency for Congress, the federal banking agencies and outside parties to use bank regulation and the applications process as a method for promoting policy goals that are not related to the issue at hand. This is not a new development—over many years, the applications process has been used as leverage to promote varying supervisory, community engagement, branching and overall system structuring goals.

Examples of this can also be found in the OCC and FDIC bank merger policies issued in 2024. The FDIC Statement of Policy required applicants to demonstrate with “specific and forward-looking information” that the combined institution will “better” meet the convenience and needs of the applicable community. The FDIC Policy Statement also required applicants to provide a detailed three-year plan for all projected or anticipated branch expansions, closures or consolidations following the merger and be prepared to make commitments for at least three years regarding future retail banking services in the relevant communities. The OCC’s Policy Statement pointedly suggested that community benefit plans and engagement would be specifically reviewed. Both the OCC’s Policy Statement and the FDIC Statement of Policy explicitly stated that the agencies would consider job losses in connection with their review.

Both of these policy statements are in the process of being withdrawn. However, the federal banking agencies should exercise great caution when formulating guidance intended to provide transparency so that they do not shut out otherwise beneficial transactions through burden shifting or adding what are equivalent to additional factors for review.

3. *Right Sizing Information Expectations for Applications*

The federal banking agencies must work to right-size information expectations with respect to applications. A fundamental disconnect has developed over time that is difficult to overcome. The banking agencies have access to more information than ever before with respect to banking organizations and applicants. I can tell you from personal experience that application packages have never been lengthier and more detailed. For those not intimately familiar with an initial merger or de novo bank application, they typically range from several hundred to several thousand pages in length depending on the size and type of transaction. Together with additional information requests, it becomes impractical for agency staff to review and absorb the amount of information submitted during the application process in any meaningful or timely way. Additionally, more information frequently begets requests for even more information. At some point, one has to ask who is reviewing all of this information, what is the materiality of such information to the application under consideration, and against what are the functional measures are the agencies even weighing this information.

From an agency staff perspective, it takes disciplined management and committed oversight to keep application forms up to date,[17] tailor information requests based on size and risk profile,

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[17] The federal banking agencies have various forms and standard information that applicants must submit when filing an application. These forms are not updated often, frequently request outdated or repetitive information, and are vague in some places. Updating forms is a thankless job. However, a thoughtful approach to updating forms could materially reduce processing times but eliminating outmoded information requests, target applicant efforts to

and ensure that requests are for "need to know" and not merely "nice to know" information. This is not an easy task to manage across various agencies and regional offices, changing leadership and priorities, as well as the inevitable fear of after-the-fact finger pointing when a transaction or organization does not work out as planned. In the end, from their perspective, it has been safer to be risk adverse than timely. These challenges will only increase if agency staff levels are decreased.

4. *Decouple the Supervisory Process from Applications Review*

Agency leadership and applications staff must take actions to avoid duplicating the supervisory process in connection with reviewing applications, including de novo and conversion applications. The applications process is not the place to revisit the supervisory status of a banking organization. Routine supervisory matters, whether existing or new, should not be roadblocks to a transaction unless the matter directly and materially implicates the proposal or management's ability to safely effectuate the transaction. Further, the federal bank regulatory agencies should not superimpose the supervisory obligations of a going concern bank onto a de novo applicant during the application process. These expectations create incredible hurdles for institutions and can be managed through the supervisory function.

Conclusion

In conclusion, maintaining a vibrant banking system that is constantly changing comes with risks and hard choices. Risk is inherent to the business of banking. Although reasonable people may disagree about where to strike the right balance, it is not practical or healthy for Congress or the federal banking agencies to attempt to reduce that risk to zero, either through the supervisory or applications processes. Not all transactions will work out as anticipated and not all banks will be successful. However, there are systems and agencies in place to minimize these risks and step in if they cannot be managed. New entrants and bank combinations bring new energy and capital into the banking system. The commonsense suggestions that I have discussed in this testimony could help rationalize the applications process and support a more dynamic industry that can better serve the needs of all Americans. A thoughtful and predicable applications process will only help preserve diversity and competition in our banking system.

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topics and information that are most relevant to the federal banking agencies and reduce the need for additional information questions. The federal banking agencies should be cautious about these efforts. Deep thought should be given to what information is truly helpful and used during the application process, what information is already available to the agencies, and what information is merely "nice to know." Updating applications forms would be particularly helpful to de novo applicants by providing more detail and objective metrics against which they can tailor their business plans.