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Banking Agency Merger Approvals: Historical and Potential Future Approaches to Consideration of Public Benefits

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As explained below, banking agencies' authority to approve bank mergers and acquisitions—in particular, their ability to take into account the public benefits of such transactions—can be used to implement new policy goals. In fact, Congress gave public benefits unique prominence in the primary statutes that govern bank merger approval; public benefits is the only consideration that allows an agency to approve an anticompetitive merger. After describing how the consideration of public benefits evolved in the merger review process, we discuss ways that the agencies may use this authority to effect the public policy goals of the Biden administration.

EVOLUTION OF THE CONSIDERATION OF PUBLIC BENEFITS IN MERGER APPLICATIONS

In deciding whether to grant approval for a bank merger, expansion or new activity, the bank's primary regulator will consider a range of factors. These factors include likely effects on competition, the financial and managerial resources and future prospects of the financial institutions involved, financial stability, and applicants' effectiveness in combatting money laundering.

Another factor regulators must consider regards the "public benefits" of the transaction.[1] For example, section 3 of the Bank Holding Company Act of 1956 (the "BHC Act") subjects bank holding companies proposing to acquire a bank to a convenience and needs standard. For every section 3 application, the Federal Reserve Board ("FRB") must consider "the convenience and needs of the community to be served", 12 U.S.C. § 1842(c)(2). The FRB may even approve a transaction with anticompetitive effects as long as those effects are "clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community", 12 U.S.C. § 1842(c)(1)(B).

This same convenience and needs standard and ability to approve an anticompetitive transaction based on the public interest also appears in the Bank Merger Act of 1960, 12 U.S.C. § 1828(c)(5). The act applies to insured depository institutions proposing to acquire or merge with another insured depository institution and is implemented by the Office of the Comptroller of the Currency ("OCC") and Federal Deposit Insurance Corporation ("FDIC") as well as the FRB.[2] (Although this article generally focuses on the FRB, the OCC and FDIC review the convenience and needs of a proposal under the Bank Merger Act in a similar manner.)

Section 4 of the BHC Act has a similar analysis for bank holding companies seeking prior approval to acquire or merge with a nonbank or engage in certain nonbanking activities.[3] This test requires the FRB to consider whether the contemplated transaction or activity "can reasonably be expected to produce benefits to the public", such as enhanced convenience, competition and efficiency, that outweigh potential adverse effects, such as decreased or unfair competition. 12 U.S.C. § 1843(j)(2)(A).[4] This article will refer to these considerations under sections 3 and 4 of the BHC Act and Bank Merger Act collectively as "public benefits" considerations.

Prior to enactment of the Community Reinvestment Act of 1977 ("CRA")[5] during the Carter administration, discussed below, the FRB generally considered the public benefits of the transaction by taking account of how a proposed merger would improve the welfare of the community, typically by citing examples such as increased lending capacity, enhanced agricultural loan services and new savings programs.[6] As noted, a lack of broader economic development within the state could even outweigh anticompetitive monopoly concerns associated with a proposed transaction.[7]

Introduction of the CRA into the Public Benefits Review – A Shift in Focus

The CRA was enacted during the era of the Civil Rights movement and aimed to involve the banking industry in the fight against urban decline and in efforts to address the credit needs of underserved communities.[8] The CRA requires the FRB and other federal banking regulators to encourage insured depository institutions to address the credit needs of the communities where they conduct business. Specifically, federal supervisory authorities must "assess the institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with safe and sound operation", 12 U.S.C. § 2903(a)(1). Banks covered by the CRA are supervised by the FRB, OCC or FDIC, which oversee CRA ratings and performance evaluations.

Following the CRA's implementation, the agencies incorporated CRA performance into the convenience and needs and public benefits inquiries. The FRB takes into account a bank's performance record under the CRA when considering the convenience and needs of the communities to be served for merger applications under section 3 of the BHC Act and the Bank Merger Act. When acting on a notice to acquire an insured depository institution under section 4 of the BHC Act, the FRB similarly reviews the relevant institutions' record of performance under the CRA in considering the public benefits of a transaction.

The addition of the CRA to the public benefits consideration caused the focal point of the FRB's analysis to shift away from the pre-CRA practice of considering the various advantages the merger could offer, and towards whether the banks involved in the proposed transaction are in compliance with the CRA. In other words, the benefits of the transaction outside of CRA performance are now given relatively less weight than before the CRA was enacted.[9] The shift in approach also provided a strong incentive for banks to maintain satisfactory or better CRA ratings. Without such a rating, as noted above, banking agencies were unlikely to permit the institution to acquire or be acquired.[10]

A Change in the Relevance of CRA Commitments to the Agencies' Review

The CRA review associated with evaluating merger applications is backwards-looking. The CRA requires the FRB to consider a financial institution's track record of helping to meet the credit needs of the local community. This retrospective review places particular weight on a bank's most recent CRA performance evaluation and, as noted above, is often a controlling factor in determining whether the proposed transaction meets the convenience and needs standard.

Thus, a successful application must demonstrate satisfactory performance under the CRA without relying on commitments for future action. The FRB has denied bank merger applications based on a failure to meet the convenience and needs standard because community commitments were insufficient to overcome poor CRA ratings.

For example, the FRB denied Totalbank Corporation of Florida's application to acquire Florida International Bank under section 3 of the BHC Act in 1995. Both the applicant and its subsidiary banks had received unsatisfactory CRA performance ratings from their primary federal supervisors.[11] Similarly, the FRB denied First Interstate BancSystem of Montana, Inc.'s application to merge with Commerce BancShares of Wyoming, Inc. in 1991 on convenience and needs grounds despite the applicant's efforts to address its identified deficiencies under the CRA. According to the FRB, reliance on commitments for future action to address CRA concerns was not appropriate in light of such weak CRA performance.[12] In this case, remediation efforts, such as improvement of credit ascertainment and increasing contact with community groups, had only been initiated recently and after the application was filed and challenged.

However, the FRB initially did consider CRA commitments relevant in limited circumstances. Specifically, the FRB believed commitments for future action to address CRA concerns to be appropriate considerations to the extent the applicant's CRA record was otherwise satisfactory, where the identified deficiencies did not indicate chronic institutional problems or a pattern of deficiencies and where the applicant took "immediate and effective action" to address its CRA deficiencies.[13]

Over time, however, the FRB's policy has evolved to generally exclude commitments for future action from evaluation of a bank's CRA performance. For example, the FRB considered NationsBank's announcement of a $350 billion, 10-year community reinvestment and lending plan to have "no relevance" to its merger application without a "demonstrated record of performance" under the CRA.[14] Rather, any such efforts would be evaluated by federal supervisors in connection with future CRA performance reviews.[15]

Furthermore, commitments to community groups are neither enforceable by the FRB nor monitored for compliance. The FRB has noted that publicly announced plans for community engagement and direct agreements with community groups are not commitments to the FRB and are thus not conditions of merger approvals.[16] In addition, the FRB considers the enforceability of such third-party pledges and agreements to be beyond the purview of the CRA.[17]

Forward-Looking Commitments Remain Relevant Outside of the Agencies' Review

Yet forward-looking commitments are still made in connection with merger applications. In fact, it has become "standard practice" for merging banks to commit to invest billions of dollars in low-income areas as a tool to build community support for their deals.[18] For example, in 2019 Truist Financial (the company created following the BB&T and SunTrust merger) made a $60 billion commitment in community investments over three years. Since 2016, banks seeking to undergo mergers have pledged approximately $300 billion in investments for community and small-business development.[19]

Many consider the application process to encourage these kinds of commitments. Banks may make commitments to community groups prior to filing their applications in order to preempt potential objections from community groups. Otherwise, substantive comments objecting to merger proposals can significantly delay the application process and lead to costly public hearings.

For example, the 12 Federal Reserve Banks generally have authority to approve bank mergers (and most are approved under this authority delegated by the FRB). However, direct FRB approval is required in certain circumstances, including when a written substantive objection has properly been submitted.[20] Strong public interest also may cause the FRB to conduct one or more public hearings for a merger. Under the Obama administration for example, protest from a community group could delay approval of a transaction for six months or longer.[21] Thus, banks often prefer to negotiate with community groups prior to filing a merger application and, if possible, without additional disclosure requirements regarding the communications with community groups.[22]

In addition, community groups are repeat players (commenters) in the merger application process. If a bank fails to deliver on prior commitments, community groups are more likely to object to future merger proposals, triggering the ramifications discussed above.[23] Thus, commitments made to community groups play a significant role for bank mergers despite the lack of formal review or enforcement by the agencies.

POTENTIAL USES OF THE PUBLIC BENEFITS CONSIDERATIONS TO ACHIEVE NEW POLICY GOALS

The banking agencies are considering changes to the merger review process as well as the CRA.[24] It would be only natural for such consideration to include evaluation of changes that might effect new policy priorities of the current administration, such as climate risk and economic inclusiveness. Below we discuss changes to the merger review process that we think the agencies may be likely to consider.

Revisions to the CRA Regulations

Last year the FRB issued an advance notice of proposed rulemaking ("ANPR") on an approach to refresh its CRA implementing regulations.[25] The ANPR seeks feedback on methods to evaluate how banks address the needs of low- and

moderate-income communities and approach credit access inequities. The ANPR's potential revisions are wide-ranging, including strengthening clarity, consistency and transparency of performance evaluations that are tailored to local conditions, tailoring performance tests and assessments to bank size and business model and clarifying and expanding eligible CRA activities focused on underserved communities, among others.

All three banking agencies appear to be working together towards a joint notice of proposed rulemaking that builds on the ANPR.[26] Although it finalized revisions to its CRA regulations in 2020, the OCC—under Acting Comptroller of the Currency Michael Hsu—rescinded such rule at the end of 2021.[27]

The agencies could propose revisions to their current CRA regulations that seek to address the Biden administration's goals of promoting an inclusive economic recovery and racial equity, and the ANPR suggests that other new policy goals could also be effected through a revised CRA regulation. Notably, the ANPR states that the FRB is considering expanding the definition of "community development" to include climate resilience in certain geographies.[28]

However, the road to the banking agencies jointly finalizing meaningful revisions to their CRA regulation is long and arduous. As made clear by the OCC's efforts, CRA revisions involve a number of complex issues, and there is a variety of stakeholders that take varying views on the issues. Interagency coordination only increases the complexity and length of the process. Thus, the banking agencies may wish to evaluate whether other tools are available that would allow the agencies to effect new policy goals in the more immediate future.

Refocusing on Forward-Looking Commitments

As a more expedient alternative to revising their CRA regulations, the agencies could incorporate both forward-looking aspirations to comply with the CRA and commitments to community groups into their consideration of the public benefits of a proposal.

Procedurally, this could be done with respect to any pending merger application; the agency's CRA regulations would not need to be amended. The FRB could revert to its policy of allowing consideration of commitments to improve CRA performance where the CRA ratings were already sufficient or could even include such commitments in its consideration of other public benefits of the transaction outside of the CRA and fair lending context.[29] Recall that the public benefits analysis initially did not include—and currently is not necessarily limited to—CRA and fair lending performance. To effect this change, the agency would simply need to rely upon any commitments given by a banking organization in connection with a planned merger as one of its reasons for deeming the public benefits to weigh in favor of approving the merger.[30] The agency could go further and explicitly condition approval on adherence to the commitments or even require that the commitments be made to the agency (as well as the community group).

Although expedient, the agencies may be reluctant to consider a bank's commitments to improve future CRA performance and commitments to community groups as factors in the public benefits inquiry. As discussed above, banks are already incentivized to make and fulfill CRA commitments; banks continue to make promises to community groups in conjunction with the merger application process, and community groups maintain tools to enforce compliance. Therefore, involvement of an agency in the process may not provide much substantive benefit to the public.

Moreover, incorporating a bank's commitments to community groups in an agency's merger approval could come with significant costs to the agency, as the agency likely would monitor compliance with the commitment and become the de facto arbiter of arising disputes. Moreover, the agency might have limited control over the substance of the commitments, as the community groups and bank are typically the primary negotiators of the commitments. Incorporating community group commitment compliance into approvals, of course, could also contradict the agencies' long-time practice of not considering such commitments, although it would not necessarily be inconsistent with the agencies' position that CRA performance evaluations are retrospective.

New Policy Goals as Public Benefits

As noted, the FRB has long recognized that public benefits encompass more than just the CRA and fair lending. The agency could explore how broadly the public benefits language could be interpreted and the extent to which it could include progress toward key policy goals.

To test this approach, we consider a public policy issue that may appear far afield from traditional public benefits considerations: climate change. Although the FRB has noted that addressing climate change risk is a priority,[31] many have highlighted the difficulty in quantifying financial risk associated with climate change or setting bright-line requirements regarding the risk. For example, at an international level, regulators are considering how to develop capital requirements to address the financial risks associated with climate change.[32] Final standards are likely to be developed, if at all, well after the current administration's term ends.

Even outside of the highly quantitative capital framework, requirements or supervisory expectations regarding climate risk may take a long time to materialize. For example, the FRB's committees to consider potential macroprudential and microprudential risks associated with climate change were only established in 2021.[33] More recently, FRB Chair Powell has stated that the FRB is developing a program to require larger banks to produce a plan describing how they would manage climate change risks.[34] In contrast to the FRB's annual stress tests, the focus of the analysis is likely to initially be on understanding what the relevant climate risks are, how they will develop and their sources. Moreover, the FRB may continue to face questions regarding whether the agency has sufficient statutory authority to promulgate requirements or expectations related to climate risk.[35]

The Financial Stability Oversight Council (the "FSOC") issued a report assessing climate-related risks to the financial system and the United States, and identified climate-related financial risks as an emerging threat to U.S. financial stability.[36] The report's recommendations included building capacity and expanding efforts to address such risks, filling relevant data and methodological gaps, enhancing public climate-related disclosures, and assessing and mitigating climate-related risks. However, the report does not have any immediate regulatory or legal effect and highlights significant additional work to be done. The OCC also recently issued for public comment broad principles for climate-related financial risk management, which the OCC is expected to elaborate upon after the initial principles are finalized.

In contrast, the merger approval process can be changed relatively quickly. It is subject to less public scrutiny than is the promulgation of generally applicable requirements and supervisory expectations. Agency decisions are not subject to prior notice and comment, the public is not generally made aware of communications between agency staff and the applicant[37] and agency approvals are not typically challenged.

However, even within the merger approval process, the agencies may be reluctant to include climate change outside of the public benefits consideration, as discussed below. Although climate change arguably could be considered a financial or managerial consideration in merger approvals, imposing additional expectations on these considerations could be viewed as unfairly critical toward the banking organization or its management because the agencies have not yet set clear expectations.

For example, the FRB declined to consider a commenter's concerns regarding a merger applicant's efforts to promote a diverse and inclusive workforce under the FRB's financial and managerial considerations.[38] The FRB may have been inclined to exclude this concern from managerial factor considerations because including such a concern could have been seen as setting implicit standards regarding diversity or otherwise penalizing applicants in the absence of clear expectations regarding diversity from the FRB. Stated another way, the FRB has not yet provided an argument that an organization's requisite managerial capabilities—in the merger review context or otherwise—include a diverse management team (or a diverse workforce generally).[39] However, these potential FRB concerns regarding implicit standard-setting and legal authority may be less prominent in the context of the public benefits inquiry.

Inclusion in the public benefits consideration may be a better fit in large part because it would allow the agencies to encourage banking organizations to address climate change risk without the agency deciding on certain quantitative metrics or other bright-line expectations. This ability to recognize and consider distinct, discrete public benefits is consistent with the FRB's approach to public benefits considerations beyond the CRA and fair lending; just as the identified public benefits of a transaction may vary from transaction to transaction, so too may the bank's proposed benefits related to climate change. For example, larger mergers or mergers where commenters have raised concerns involving the public benefits factor could be expected to produce additional public benefits, such as those addressing climate change risk.[40]

In addition, the legal authority for including climate change within the public benefits consideration may be less controversial than the authority for setting generally applicable requirements. Climate-related actions would be another

way for a bank to help satisfy the public benefits inquiry but, like other potential public benefits of a particular merger proposal, no particular action would be required for a particular merger; banks would have flexibility regarding whether and how they address climate-related risks.

Moreover, agency attorneys may be comfortable taking the position that climate risk fits within the statutory language of the public benefits consideration, especially in light of the lower ability to challenge application decisions as compared to rulemakings. Arguing that a banking organization's actions to address climate risk can have a positive impact on the "convenience and needs of the community" or "produce benefits to the public" may be seen by many as a relatively natural reading of the text in present day.[41]

Considering a bank's approach to climate change as part of an agency's merger application review process also aligns with the "whole-of-government" and "whole-of-economy" tactic being deployed against climate change in the United States. As Treasury Secretary Janet Yellen has explained, "the financial sector has an opportunity to play an important role in financing and leading the transition of the global economy to a net-zero economy".[42]

It also aligns with President Biden's executive order ("EO") calling for banking regulators to rethink their merger review processes.[43] The EO instructed the Attorney General, in consultation with the heads of the FRB, FDIC and OCC, "to review current practices and adopt a plan . . . for the revitalization of merger oversight under the Bank Merger Act and the [BHC Act] that is in accordance with the factors enumerated in [the Bank Merger Act and section 3 of the BHC Act]".[44] The EO therefore directs the agencies to consider all factors enumerated in the statute (*e.g.*, public benefits)—not just those related to competition. Both of these statutes explicitly link competitive considerations to public benefits by allowing anticompetitive transactions to be approved if the anticompetitive effects are outweighed by public benefits. Thus, a focus on public benefits when reconsidering the FRB's competitive review arises naturally, and arguably with congressional endorsement, and offers another way to address the administration's and EO's concerns.[45]

Of course, the expanded approach to the public benefits consideration we discuss above could be used to effect other new policy initiatives. We use climate change merely as an example—a test case. In other areas, many argue that banking organizations also have a role to play in promoting inclusive economic recovery and racial equity. Indeed, this is the position of the FRB, which has expressed that bank holding companies are "particularly suited" to play a "meaningful and substantial role" in addressing social issues.[46] Actions to address these concerns also could be considered within the public benefits consideration in a manner that does not set hard-wired or retroactive expectations for banking organizations generally.

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[1] Mehrsa Baradaran, *Banking and the Social Contract*, 89 NOTRE DAME LAW REVIEW 1283, 1337 (2014).

[2] *See also* 12 U.S.C. § 1828(c)(1)-(2) (providing other types of transactions that require approval under the act).

[3] The public benefits test was added to section 4 of the BHC Act in 1970. Pub. L. No. 91-607 (Dec. 31, 1970).

[4] Section 163 of the Dodd-Frank Act also applies this public benefits test to bank holding companies with total consolidated assets of $250 billion or more, and nonbank financial companies supervised by the FRB, seeking to acquire shares of a company with total consolidated assets of $10 billion or more engaged in activities under section 4(k) of the BHC Act (activities financial in nature). 12 U.S.C. § 5363(b)(4).

[5] Pub. L. No. 95-128, 91 Stat. 1147 (codified as amended at 12 U.S.C. § 2901–2909).

[6] *See, e.g.*, W. Mich. Corp., 63 Fed. Res. Bull. 506, 508 (1977); Tex. Commerce Bancshares, Inc., 58 Fed. Res. Bull. 984, 986 (1972).

[7] *See generally* First Ala. Bancshares, Inc., 57 Fed. Res. Bull. 404, 407, 411 (1971).

[8] *See* Baradaran, *supra* note 1, at 1300–01.

[9] *See, e.g.,* Baradaran, *supra* note 11, at 1340 (citing Citizens Fin. Grp., Inc., 71 Fed. Res. Bull. 473, 475 (1985)). The FRB also considers overall compliance records and recent fair lending examinations as part of the public benefits consideration.

[10] The Gramm-Leach Bliley Act of 1999 added another meaningful incentive for certain banking organizations to maintain satisfactory CRA ratings. Under the law, bank holding companies that successfully elect to become financial holding companies ("FHCs") may acquire new companies engaged in the broader set of activities permitted only for FHCs if, among other things, the holding companies' subsidiary insured depository institutions maintain satisfactory CRA ratings or better. 12 U.S.C. § 1843(*l*)(2).

[11] While the applicant had taken steps to improve its CRA record and address identified deficiencies, the FRB nevertheless denied the application reasoning that before an application to expand is filed, an organization "should address its CRA responsibilities and have the necessary policies in place and working well". 81 Fed. Res. Bull. 876, 878 (1995).

[12] 77 Fed. Res. Bull. 1007, 1009 (1991).

[13] *See id*.

[14] Fed. Res. Order, NationsBank Corporation/BankAmerica Corporation 64 (1998).

[15] *See id*.

[16] *See* Fed. Res. Order, Bank of America Corporation/FleetBoston Financial Corporation 51–52 (2000); Fed. Res. Order, Bank of America Corporation/Countrywide Financial Corporation 25 (2008).

[17] *See id*.

[18] Jon Prior, *Behind PNC's $88 billion commitment to invest in communities*, American Banker (April 28, 2021).

[19] *See id*.

[20] *See* 12 CFR 265.11(c)(11)(iii).

[21] *See* the FRB's March 2021 Semiannual Report on Banking Applications Activity, which describes the significantly longer amount of time it takes to process and approve merger proposals that have received adverse public comments. For example in 2020, merger applications that did not receive any adverse public comments were processed, on average, in 64 days compared to 232 days for proposals that received adverse public comments. *Id.* at 4.

[22] In response to an OCC proposal to require banks to provide summaries of (or documents pertaining to) all substantive discussions regarding development of community reinvestment plans, community benefit plans or similar plans in connection with a business combination, commenters argued that the requirement would be unduly burdensome and have a chilling effect on, and discourage candid interaction with, community groups. 85 Fed. Reg. 80404, 80414 (December 11, 2020). The OCC nonetheless finalized the requirement, reasoning that disclosure will support transparency and lead to more robust agreements between banks and their communities. *Id.* Relatedly, section 711 of the Gramm-Leach-Bliley Act of 1999 already imposes "CRA Sunshine" provisions establishing reporting and public disclosure requirements for certain written agreements between insured depository institutions and nongovernmental entities made in connection with the CRA. Pub. L. No. 106-102, 113 Stat. 1338, 1465–66 (codified at 12 U.S.C. § 1831y(a)–(c)).

[23] *See, e.g.*, Fed. Res. Order, Bank of America Corporation/FleetBoston Financial Corporation at 51. Commenters urged the FRB to withhold approval of Bank of America's application until it satisfied certain community commitments made in connection with a prior merger application. *Id*.

[24] *See, e.g.*, FRB Governor Bowman's February 16, 2021 speech; FRB Chair Powell's May 3, 2021 speech; FRB Governor Brainard's May 14, 2021 statement.

[25] 85 Fed. Reg. 66410 (Oct. 19, 2020).

[26] The Interagency Statement on Community Reinvestment Act Joint Agency Action (July 20, 2021) is available here.

[27] 86 Fed. Reg. 71328 (Dec. 15, 2021).

[28] 85 Fed. Reg. at 66448.

[29] *See* KeyCorp, FRB Order No. 2016–12 (July 12, 2016) (highlighting the benefits of the applicant's plan, developed with various community organizations, to invest $16.5 billion in communities as an additional public benefits consideration outside of the FRB's CRA discussion).

[30] The agency presumably would feel compelled to acknowledge any change in policy and explain its rationale for the change. *See FCC v. Fox Television Stations, Inc*., 556 U.S. 502 (2009).

[31] *See, e.g.*, former FRB Vice Chair for Supervision Quarles's May 26, 2021 speech; FRB Governor Brainard's March 23, 2021 speech.

[32] *See*, *e.g.*, the Basel Committee on Banking Supervision's consultative document, Principles for the effective management and supervision of climate-related financial risks (Nov. 2021) here. In addition to capital and liquidity adequacy, the consultation addresses corporate governance; internal control frameworks; risk management processes; management monitoring and reporting; comprehensive management of credit risk; comprehensive management of market, liquidity, operational and other risks; and scenario analysis. The comment period closes February 16, 2022. The Basel Committee on Banking Supervision has also reiterated that it is exploring the use of the Pillar 3 framework to promote a common disclosure baseline for climate-related financial risks. *See* the Basel Committee on Banking Supervision's November 9, 2021 press release here.

[33] The creation of the FRB's Supervision Climate Committee and Financial Stability Climate Committee were both announced in the first quarter of 2021.

[34] FRB Chair Powell made his remarks in testimony to the House Financial Services Committee on September 30, 2021, available here.

[35] *See, e.g.*, letter from Senator Pat Toomey to San Francisco Reserve Bank President Mary C. Daly (March 29, 2021), available here.

[36] *See* the FSOC's Report on Climate-Related Financial Risk here.

[37] For example, a commenter to a proposal may receive summaries of communications between the applicant and the agency to the extent relevant to the comment.

[38] Huntington Bancshares Inc., FRB Order No. 2021-07 (May 25, 2021) [hereinafter "Huntington Order"].

[39] In both the managerial and public benefits sections of the Huntington Order, the FRB stated that the diversity of an applicant's workforce and that of its suppliers is outside the factors the FRB is authorized to consider. The Huntington Order and the potential scope of the public benefits consideration is discussed in footnote 41, below.

[40] An expectation of additional public benefits, such as those related to climate change risk, could be seen as a natural consequence of a larger transaction; an acquisition or merger that is more significant to the U.S. economy simply might be expected to produce more significant public benefits. As is currently the case for the consideration of additional public benefits, the agency's enumeration and analysis of them could be done on a case-by-case basis without establishing strict or one-size-fits-all expectations.

Additional public benefits even could be seen as offsetting concerns regarding the public benefits factor (*e.g.*, concerns highlighted by public comments) or other factors (*e.g.*, competition, financial stability). Although the FRB generally seeks to find each consideration under the BHC Act and Bank Merger Act consistent with approval, the statutes permit a much more flexible approach. Section 3 of the BHC Act and the Bank Merger Act merely require the agency to take the public benefits and most other statutory factors into consideration, and both statutes endorse approval of certain anticompetitive transactions based on a transaction's overriding public benefits. Section 4 of the BHC Act not only endorses, but explicitly requires, a balancing of benefits of the transaction against possible adverse effects.

[41] As noted above, the FRB's Huntington Order states that the diversity of an applicant's workforce and that of its suppliers is outside the factors the FRB is authorized to consider, including the public benefits consideration. This conclusion appears distinguishable from many current policy goals (*e.g.*, economic inclusiveness, climate change) because workforce diversity, unlike those policy goals, does not necessarily focus on benefits to a community (or the public) on the whole. Rather, it is more akin to the limited group of stakeholders identified in *Western Bancshares, Inc. v. Board of Governor*s, which the FRB cites in support of its conclusion that it lacks statutory authority to consider workforce diversity. 480 F.2d 749 (10th Cir. 1973) (holding that the FRB did not have the statutory authority under section 3 of the BHC Act to deny a merger solely due to the insufficiency of the purchase price paid to minority shareholders of the target). In addition, the public benefits analysis contemplated herein would not necessarily cause the FRB to deny a merger application based on a lack of a particular, newly identified public benefit (*e.g.*, climate change), as the FRB did in *Western Bancshare*s. Rather, the FRB would have flexibility to determine whether and the extent to which newly identified public benefits are (or should be) present in a transaction.

[42] Secretary Yellen's April 21, 2021 remarks are available here.

[43] Exec. Order 14036, 86 Fed. Reg. 36987 (July 14, 2021) is available here.

[44] 86 Fed. Reg. at 36992.

[45] *See, e.g.*, 86 Fed. Reg. at 36987 ("Yet over the last several decades, as industries have consolidated, competition has weakened in too many markets, denying Americans the benefits of an open economy and widening racial, income, and wealth inequality. Federal Government inaction has contributed to these problems, with workers, farmers, small businesses, and consumers paying the price".).

[46] *See* 12 CFR 225.127(a).