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De Novo Banks: Regulatory Flexibility and Merger Activity May Not Be Enough to Spawn New Charters

I. INTRODUCTION

Increased de novo banking activity provides valuable services to communities nationwide.[1] De novo banks offer credit services to the agricultural industry, residential mortgage borrowers, and communities that may otherwise find little assistance from alternative financial institutions.[2] Additionally, by injecting energy into community banking sectors lacking competition, de novo banks fill important voids within local banking markets.[3] This contribution is vital in light of a Federal Deposit Insurance Corporation ("FDIC") report claiming that community banks provide 42% of small business loans nationwide.[4] As such, it is no surprise that FDIC Chairman Jelena McWilliams suggests that a prosperous de novo landscape is "critical to the long-term health of the [banking] industry and communities across the country."[5]

Along with many other United States financial institutions, de novo banks faced significant hardship following the 2008 Financial Crisis.[6] Despite efforts by federal regulatory agencies to jumpstart de novo banking activity, the power of these agencies to affect change is

1. Trey Sullivan, *2017 Likely to Be a Record-Breaking Year*, TRUPOINT (Feb. 15, 2017), https://www.trupointpartners.com/blog/de-novo-banks-2017 [https://perma.cc/BWS9-8VWG] (describing the various benefits de novo banks bring to their respective communities).

2. Kylee Wooten, *The Role of De Novo Banks in Community Banking*, ABRIGO (Aug. 14, 2018), https://www.abrigo.com/blog/2018/08/14/the-role-of-de-novo-banks-in-community-banking/ [https://perma.cc/8QTA-BM85]; FED. DEPOSIT INS. CORP., DE NOVO BANKS: ECONOMIC TRENDS AND SUPERVISORY FRAMEWORK 3 (2016), https://www.fdic.gov/regulations/examinations/supervisory/insights/sisum16/si_summer16-article01.pdf [https://perma.cc/4LJ2-ERNC].

3. FED. DEPOSIT INS. CORP., *supra* note 2, at 3.

4. Press Release, Fed. Deposit. Ins. Corp., FDIC Releases Report on Small Business Lending Survey (Oct. 1, 2018) (on file with author).

5. Press Release, Fed. Deposit. Ins. Corp., FDIC Announces Actions (Dec. 6, 2018) (on file with author).

6. *See* Robert M. Adams & Jacob P. Gramlich, *Where Are All the New Banks? The Role of Regulatory Burden in New Charter Creation* 2 (Fed. Reserve Bd. Divs. of Research & Statistics and Monetary Affairs, Working Paper No. 113, 2014), https://www.federalreserve.gov/econresdata/feds/2014/files/2014113pap.pdf [https://perma.cc/WE6Y-SUD6] (explaining only seven new bank charters emerged from 2009 to 2013).

limited.[7] Moreover, research suggests that the FDIC's implementation of stricter bank regulations post-Financial Crisis played only a minimal role in decreased de novo bank entry.[8]

At first glance, those desirous of a return to the pre-2008 de novo banking landscape may find hope in recent legislative efforts, including the Economic Growth Act and corporate tax rate cuts.[9] Although such legislative reforms may alleviate difficulties facing de novo bank formation, these efforts alone are likely insufficient to reestablish pre-2008 de novo banking numbers.[10] However, de novo hopefuls should pay attention to movement within North Carolina's banking industry, where the high volume of bank consolidation, including the largest bank merger in over a decade,[11] could provide assistance to a barren de novo landscape.[12]

This Note proceeds in seven parts. Part II provides a brief overview of recent de novo activity and two theories for the recent decline in new bank entry.[13] Part III discusses the FDIC's recent efforts to encourage new bank entry.[14] Part IV assesses limitations on the FDIC's

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7. *See* FED. DEPOSIT INS. CORP., WHO IS THE FDIC?, https://www.fdic.gov/about/learn/symbol/index.html [https://perma.cc/G8WV-F528] (last updated May 3, 2017) (stating the FDIC's primary role includes insuring bank deposits, overseeing bank compliance with various laws, and responding to certain bank failures).

8. *See* Adams & Gramlich, *supra* note 6, at 27 (explaining that various non-regulatory factors likely led to at least 75% to 80% of the de novo bank decline following the Financial Crisis).

9. *See* Hilary Burns, *The De Novo Boom Is Just Getting Started*, AM. BANKER (May 7, 2018, 12:14 PM), https://www.americanbanker.com/news/the-de-novo-boom-is-just-getting-started [https://perma.cc/3Y2M-KKFT] [hereinafter *De Novo Boom*] (describing the potential benefits of recent corporate tax rate cuts for de novo bank formation); *see also* Joseph C. Fields, Note, *The Potential Effect of the Economic Growth Act of 2018 on Bank Mergers and Acquisitions: What This Means for De Novo Banks and CRA Lending*, 23 N.C. BANKING INST. 359, 373 (2019) (explaining why the EGA's provisions may provide incentive for increased de novo formation).

10. *See* Paul Davis, *Bank M&A in 2019: Pace up, Premiums down*, AM. BANKER (Nov. 11, 2019, 9:00 PM), https://www.americanbanker.com/list/bank-m-a-in-2019-pace-up-premiums-down [https://perma.cc/F7PK-E9NQ] (describing the EGA's current shortfalls in prompting M&A activity in 2019).

11. Hilary Burns, *Will BB&T-SunTrust Start a De Novo Wave?*, AM. BANKER (Mar. 12, 2019, 2:21 PM), https://www.americanbanker.com/news/will-bb-t-suntrust-merger-start-a-de-novo-wave [https://perma.cc/LX9G-M7CW] [hereinafter *De Novo Wave*] (describing the potential benefits of the BB&T-SunTrust merger for North Carolina's de novo banking landscape).

12. *Id.*; *De Novo Boom*, *supra* note 9; Hilary Burns, *Why North Carolina is De Novo Central*, AM. BANKER (Mar. 6, 2018, 2:11 PM), https://www.americanbanker.com/news/why-north-carolina-is-de-novo-central [https://perma.cc/S2VN-D66U] [hereinafter *De Novo Central*].

13. *See infra* Part II.

14. *See infra* Part III.

ability to assist in de novo bank formation, as well as congressional action to possibly compensate for these limitations.[15] Part V analyzes North Carolina's potential receptiveness to new bank entry amid changing conditions throughout the state's banking landscape.[16] Part VI describes proactive measures the FDIC and new bank management can take toward ensuring success in establishing and maintaining newly formed banks.[17] Part VII discusses the landscape for de novo banks going forward.[18]

II. THE RECENT HISTORY OF DE NOVO BANKING AND POSSIBLE REASONS FOR LOW DE NOVO FORMATION FOLLOWING THE 2008 FINANCIAL CRISIS

From 2009 to 2013, only seven new bank charters were established nationally,[19] a sharp decline from an average of more than 100 de novo bank formations per year from 2002 to 2008.[20] These numbers should hardly come as a surprise, however, due to the cyclical nature of de novo formation.[21] For instance, de novo activity surged throughout the economic growth periods of the early 1960s, 1970s, and 1980s; it declined following the economic downturns of the late 1980s and early 1990s, then once again recovered as economic conditions improved in the mid-1990s.[22]

If history continues to hold true, what goes down should come back up.[23] In other words, history demonstrates that de novo activity typically decreases during recessions and fares well during periods of economic upswing.[24] However, some feel the current scarcity of de novo banks is unparalleled throughout recent history,[25] and the numbers

15. *See infra* Part IV.
16. *See infra* Part V.
17. *See infra* Part VI.
18. *See infra* Part VII.
19. Adams & Gramlich, *supra* note 6, at 2.
20. ROISIN MCCORD ET AL., FED. RES. BANK OF RICHMOND, EXPLAINING THE DECLINE IN THE NUMBER OF BANKS SINCE THE GREAT RECESSION 2 (2015), https://www.richmondfed.org/~/media/richmondfedorg/publications/research/economic_brief/2015/pdf/eb_15-03.pdf [https://perma.cc/E2JX-5KSD].
21. FED. DEPOSIT INS. CORP., *supra* note 2, at 3.
22. *Id*.
23. *See id*. (showing the cyclical nature of de novo bank formation).
24. *Id*.
25. A. GEORGE IGLER & ROBERT J. ANGERER, JR., IGLER PEARLMAN P.A., COMMUNITY BANKING IN THE 21ST CENTURY 1 (2018), http://iglerlaw.com/wp-content/uploads/2018/02/Community-Banking-in-the-21st-Century.pdf [https://perma.cc/C5NJ-K5EP].

certainly support this assertion.[26] For example, following the nine-month recession from July 1990 to March 1991, although new FDIC-insured commercial bank charters declined considerably from just under 150 in 1990, the number of new charters never fell far below fifty in each year from 1991 to 1994, before eventually shooting up again.[27] Contrast this to slightly under 100 new FDIC-insured commercial bank charters in 2008, to only twenty-four in 2009,[28] and practically zero for many of the years following.[29]

As time progresses following the Financial Crisis, however, a gradual uptick in de novo interest is currently on pace with recent economic improvement.[30] For instance, in 2018 the FDIC received twenty-four applications for federal deposit insurance—more than double the number of applications filed in 2017.[31] Further, based on the twenty-one applications filed by the end of 2019, the 2018 increase was more than just an anomaly.[32] However, predicting whether this uptick in deposit insurance applications will actually result in a full blown de novo banking resurgence first requires understanding the post-2008 de novo bank decline.[33] The two main theories proposed for the significant reduction in de novo bank entry following the 2008 Financial Crisis include: (i) new legislation resulting in increased regulatory burden on banks; and (ii) a weak macro economy.[34]

26. *See* Kimberly Amadeo, *History of Recessions in the United States*, BALANCE, https://www.thebalance.com/the-history-of-recessions-in-the-united-states-3306011 [https://perma.cc/8WFT-22JA] (last updated Dec. 7, 2019) (illustrating the United States' history of recessions); *see also id.* (graphing the number of de novo bank applications submitted by year throughout the United States).

27. Amadeo, *supra* note 26; IGLER & ANGERER, *supra* note 25.

28. M. Szmigiera, *Number of New FDIC-Insured Commercial Bank Charters*, STATISTA (Nov. 7, 2019), https://www.statista.com/statistics/193052/change-in-number-of-new-fdic-insured-us-commercial-bank-charters/ [https://perma.cc/59ZK-GDAU].

29. IGLER & ANGERER, *supra* note 25.

30. *Id*.

31. Dan Ennis, *De Novo Activity Fell in 2019*, BANKING DIVE (Jan. 3, 2020), https://www.bankingdive.com/news/de-novo-activity-fell-2019-fdic/569775/ [https://perma.cc/86W6-CHS2]; Rachel Witkowski, *Floodgates Open? De Novo Applications Surge at FDIC*, AM. BANKER (Oct. 3, 2018, 4:34 PM), https://www.americanbanker.com/news/floodgates-open-de-novo-applications-surge-at-fdic [https://perma.cc/T49Y-8CVY].

32. *See* Ennis, *supra* note 31 (explaining that twenty-one de novo applications were submitted by the end of 2019).

33. Adams & Gramlich, *supra* note 6, at 2–3 (providing two theories for the post-2008 de novo bank decline).

34. *Id*.

A. *The Impact of Stricter Regulations Imposed on Banks Following the 2008 Financial Crisis*

Because de novo banks failed at approximately double the rate of more established banks during the Financial Crisis, the FDIC was criticized for its lenient deposit insurance approval standards leading up to 2008.[35] In response, the FDIC reformed its regulatory scheme, making it more difficult for new banks to gain FDIC insurance.[36] Such regulatory changes included: higher capital ratio requirements;[37] increased attention on Bank Secrecy Act anti-money laundering requirements;[38] implementation of enterprise risk management systems;[39] and greater emphasis on competent corporate governance.[40]

Apart from imposing stricter standards on those seeking deposit insurance, regulations were enacted to affect the already existent banking industry.[41] Such regulations included the Basel Committee's increased capital and liquidity requirements; increased regulatory compliance demanded by the Dodd-Frank Financial Reform and Consumer Protection Act; and additional rules instituted by the Consumer Financial Protection Bureau regarding mortgage lending.[42]

Ultimately, the increased regulatory burden on de novo bank entry and activity post-Financial Crisis, combined with the banking industry's uncertainty regarding the interpretation and future application of these regulations, may have decreased the attractiveness of chartering a new bank.[43]

B. *The Impact of a Weak Macro Economy Following the 2008*

35. James M. Kane et al., *Phoenix Rising: De Novo Bank Formation?*, VEDDER PRICE (Mar. 22, 2018), https://www.vedderbanking.com/2018/03/update-de-novo-bank-formation-2015-2018/ [https://perma.cc/XV7G-22JA].

36. *Id*.

37. *Id.*; Financial Institution Letter from the Fed. Deposit Ins. Corp. to Newly Insured FDIC-Supervised Depository Institutions (Aug. 28, 2019) (on file with author), https://www.fdic.gov/news/news/financial/2009/fil09050.pdf [https://perma.cc/C3X6-A6SK].

38. Kane et al., *supra* note 35.

39. *Id.*; Financial Institution Letter from the Fed. Deposit Ins. Corp, *supra* note 37.

40. FED. DEPOSIT INS. CORP., CRISIS AND RESPONSE: AN FDIC HISTORY, 2008–2013 91 (2018), https://www.fdic.gov/bank/historical/crisis/crisis-complete.pdf [https://perma.cc/TGU9-6MXD]; Kane et al., *supra* note 35.

41. Adams & Gramlich, *supra* note 6, at 3.

42. *Id*.

43. *Id*.

Financial Crisis

The FDIC suggests that the de novo bank decline resulted substantially from influences separate from the agency's deposit insurance application process.[44] Similarly, a Federal Reserve Board ("FRB") study on the weak, post-2008 macro economy's effect on decreased de novo activity proposes that interest rates and other non-regulatory factors likely caused at least 75% to 80% of the decline in new charters from 2009 to 2013.[45] To explain this decline, the study identifies two consequences of the post-2008 macro economy responsible for lower banking profits: (i) a decrease in the federal funds rate; and (ii) a low demand for banking services.[46]

First, the 2008 recession led the Federal Reserve ("Fed") to lower its benchmark interest rate to a range of 0.0% to 0.25%, essentially zero, until December 2015 when the Fed raised interest rates to a target range of 0.25% to 0.5%.[47] This low interest rate environment was particularly harmful for new banks, whose net interest margins are tied much closer to the Federal Funds rate than are the net interest margins of established banks.[48] This is because newly chartered banks have no foundation of past loans on which they collect interest.[49] Instead, these entrant banks primarily hold lower yielding government securities and federal funds, and the loans these banks issue during their early days are issued at or near current interest rates.[50] As a result, new bank profitability post-Financial Crisis was at the mercy of near zero interest rates.[51]

44. Lalita Clozel, *OCC Attacks on FDIC's De Novo Process Are off Base, Experts Say*, AM. BANKER (Aug. 10, 2017, 1:49 PM), https://www.americanbanker.com/news/occ-attacks-on-fdics-de-novo-process-are-off-base-experts-say [https://perma.cc/R2LA-M9YN] ("[T]he FDIC and Fed have argued that the de novo drought has more to do with factors other than the application process at the agencies, including the low level of interest rates.").

45. *See* Adams & Gramlich, *supra* note 6, at 27 (describing the results of a study conducted by Federal Reserve Board members Robert Adams and Jacob Gramlich).

46. *Id*. at 2–3.

47. *See id*. at 3 (stating that a low interest rate environment emerged from the weak economy post-Financial Crisis);
Kimberly Amadeo, *Fed Funds Rate History with Its Highs, Lows, and Charts*, BALANCE, https://www.thebalance.com/fed-funds-rate-history-highs-lows-3306135 [https://perma.cc/Z6R9-T5HQ] (last updated Jan. 29, 2020); Jeff Cox, *Fed Raises Rates by 25 Basis Points, First Since 2006*, CNBC, https://www.cnbc.com/2015/12/16/fed-raises-rates-for-first-time-since-2006.html [https://perma.cc/4Y8S-YJD7] (last updated Dec. 17, 2015, 8:50 AM).

48. Adams & Gramlich, *supra* note 6, at 11.

49. *Id*. at 11–12.

50. *Id*.

51. *Id*.

Second, the study reasons that decreased expansion by existing banks into new geographic markets signified an overall lowered demand among households and businesses for banking services, particularly loans and deposit-taking services, following 2008.[52] Because both new bank charters and expansion by established banks reached historically low levels, it is unlikely that regulations affecting only de novo banks were primarily responsible for the overall decline in bank entry.[53] In other words, incumbent bank expansion should not have declined to historically low levels solely due to the FDIC's 2009 restrictions on de novo banks.[54] So factors common to both established and de novo banks must have led to the decline in expansion.[55]

Further, looking specifically at the effect of increased compliance costs on de novo bank formation, the Fed determined that incumbent banks' non-interest costs to asset ratios remained steady throughout the decades leading up to its study, and that de novo banks' ratios only slightly increased following 2007.[56] However, it is important to note that since this 2007 study, the Federal Reserve Bank of St. Louis has indicated that smaller banks are hit harder by compliance costs than their larger counterparts.[57] In fact, researchers found that as bank size decreases, relative compliance costs go up.[58] For example, banks holding assets under $100 million claimed that, on average, approximately 10% of their noninterest expenses went toward covering compliance costs, while the study's largest banks allocated, on average, only 5% of their non-interest expenses toward compliance costs.[59]

III. FDIC ACTION TO SPARK A RESURGENCE IN DE NOVO BANK

52. *Id.* at 4–5, 27.
53. *Id.* at 5.
54. *Id.*
55. *Id*.
56. *Id*. at 13.
57. Sarah Chacko, *Compliance Costs Drop but Small Banks Pay More Than Big Ones*, WSJ PRO CENTRAL BANKING (Apr. 26, 2018, 5:38 PM), https://www.wsj.com/articles/compliance-costs-drop-but-small-banks-pay-more-than-big-ones-1524778738 [https://perma.cc/LS8U-THGF].
58. *Id*.
59. *Id*.

APPLICATIONS

Ultimately, every de novo bank must procure FDIC deposit insurance.[60] However, de novo banks have a choice on whether to apply for a national or state charter.[61] A de novo bank pursuing a national charter must apply to the Office of the Comptroller of the Currency ("OCC"), and upon approval, is supervised by the OCC and gains Federal Reserve System membership.[62] A de novo bank pursuing a state charter will apply to the applicable state's regulatory officials, and upon approval, is supervised by the state's banking commission, along with either the Federal Reserve for state member banks or the FDIC for state nonmember banks.[63]

Regardless of which charter is chosen, the FDIC, the Fed, and the OCC are all campaigning for de novo bank formation.[64] For example, the OCC demonstrated its support by suspending the application fees for new bank charters in 2018.[65] It is clear, however, that the FDIC has provided the most active support for new bank charters among the regulatory agencies.[66] In fact, some believe that the FDIC has corrected a faulty de novo process.[67] Whether or not the FDIC actually fixed the de novo process is still up for debate.[68] However, the agency

60. KW Stevenson, *How to Start a De Novo Bank?*, BMA (Apr. 3, 2019), https://www.bmabankingsystems.com/blog/2019/4/3/how-to-start-a-de-novo-bank [https://perma.cc/7RTU-PWKW].

61. P'SHIP FOR PROGRESS, DE NOVO BANK APPLICATION PROCESS, https://www.fedpartnership.gov/bank-life-cycle/start-a-bank/de-novo-bank-application-process [https://perma.cc/S4AZ-L787] (last visited Jan. 6, 2020).

62. *Id.*

63. *Id.*

64. E-mail from Todd H. Eveson, Attorney, Wyrick, Robbins, Yates, & Ponton, to author (Oct. 16, 2019, 7:58 EST) (on file with author) (explaining that the Fed is pushing for de novo bank formation along with the FDIC); *see also* IGLER & ANGERER, *supra* note 25, at 5 (stating that the OCC has suspended application fees for new bank charters in 2018).

65. IGLER & ANGERER, *supra* note 25, at 5.

66. *See* Clozel, *supra* note 44 ("Some even argue that the FDIC is more interested in the formation of traditional new community banks than the OCC . . . ."); *see also* Monica C. Meinert, *FDIC Launches Initiative to Encourage De Novo Formation*, ABA BANKING J. (Dec. 6, 2018), https://bankingjournal.aba.com/2018/12/fdic-launches-initiative-to-encourage-de-novo-formation/ [https://perma.cc/9QMF-8C5E] (outlining the FDIC's efforts to help initiate de novo bank formations).

67. Donald Musso serves as President and CEO of FinPro, a consultancy that helps financial institutions apply for bank charters. Clozel, *supra* note 44 (quoting Donald Musso saying "[t]he FDIC has fixed the de novo process").

68. *See id.* (providing the Comptroller of the Currency's accusations that the FDIC is intentionally keeping de novo banks from successfully completing the deposit insurance application).

undoubtedly implemented substantial changes in an effort to resurrect de novo activity, supporting one bank insider's assertion that the FDIC is desperately working to attract new bank entrants.[69]

As failure for de novo banks more than doubled that of smaller established community banks during the Financial Crisis, the FDIC's deposit insurance approval standards leading up to this period were criticized as too lenient.[70] Such alarming statistics pushed the FDIC to send out FIL-50-2009,[71] increasing the period for heightened review of newly chartered banks from three years to seven years.[72] During this seven-year period, new FDIC insured banks were required to hold greater capital, and experienced increased FDIC examination.[73] However, the FDIC repealed FIL-50-2009 on April 6, 2016, consequently reducing the period of enhanced supervisory monitoring of newly insured depository institutions from seven years to three years.[74] As a result, de novo banks must now only hold a minimum of 8% Tier 1 Leverage Capital[75] for the first three years of operation instead of seven.[76] At the very least, this change is symbolically significant as it parallels the pre-recession standard found in the *FDIC Statement of Policy on Applications for Deposit Insurance*.[77]

The FDIC also began taking measures in 2014 aimed toward promoting greater transparency throughout the deposit insurance

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69. Meinert, *supra* note 66; Hilary Burns, *Will De Novo Activity Pick up in 2019? Don't Bet on It*, AM. BANKER (Dec. 21, 2018, 1:33 PM) [hereinafter *De Novo Activity*], https://www.americanbanker.com/news/will-de-novo-activity-pick-up-in-2019-think-again [https://perma.cc/KZ2P-FAGU].

70. Kane et al., *supra* note 35.

71. The FDIC's Financial Institution Letter titled "Enhanced Supervisory Procedures for Newly Insured FDIC-Supervised Depository Institutions." Financial Institution Letter from the Fed. Deposit Ins. Corp., *supra* note 37.

72. *Id*.

73. *Id*.

74. Kane et al., *supra* note 35; Clozel, *supra* note 44.

75. A bank's Tier 1 capital ratio is its core capital (i.e., disclosed reserves and common stock) divided by its risk-weighted assets (bank assets weighted by credit risk). Mitchell Grant, *Tier 1 Capital*, INVESTOPEDIA, https://www.investopedia.com/terms/t/tier1capital.asp [https://perma.cc/9DZ4-5QEN] (last updated May 6, 2019).

76. IGLER & ANGERER, *supra* note 25, at 2.

77. *See* FED. DEPOSIT INS. CORP., FDIC STATEMENT OF POLICY ON APPLICATIONS FOR DEPOSIT INSURANCE, https://www.fdic.gov/regulations/laws/rules/5000-3000.html [https://perma.cc/3KEE-UTAN] (last updated Apr. 20, 2014) ("Normally, the initial capital of a proposed depository institution should be sufficient to provide a Tier 1 capital to assets leverage ratio . . . of not less than 8.0% throughout the first three years of operation."); *see also* IGLER & ANGERER, *supra* note 25, at 3 (explaining that prior to the 2008 Financial Crisis the de novo period lasted for three years instead of seven); Kane et al., *supra* note 35, at 2.

application process.[78] For example, the FDIC issued Deposit Insurance "Questions and Answers" to help applicants better comprehend the steps required to complete the federal deposit insurance application.[79] Further, in 2017, the FDIC issued a handbook designed to guide applicants through the federal deposit application process.[80] The FDIC also established outreach meetings in several regions throughout the country for those seeking a de novo charter.[81] These meetings identify helpful resources for applicants and provide an overview of the FDIC's application review procedures.[82]

Along with encouraging greater transparency throughout the application process, the FDIC provided applicants ample opportunity to improve the strength of their applications before officially submitting them for review.[83] Specifically, new deposit insurance applicants may now receive instructive feedback on a draft application from FDIC staff members before filing their formal application.[84]

Lastly, the FDIC requested feedback on other ways to enhance the deposit insurance application process, demonstrating its dedication to continuous improvement.[85] For example, the FDIC posed specific questions to commenters asking what changes the FDIC could make to the application process for traditional community banks.[86]

The FDIC has not been alone in its efforts to combat the de novo shortage.[87] The American Bankers Association ("ABA") provided the

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78. *See* FED. DEPOSIT INS. CORP., *supra* note 2, at 7 (describing the purpose and use of the FDIC Deposit Insurance "Questions and Answers" (Q&As) issued in November 2014).

79. *Id.*; FED. DEPOSIT INS. CORP., SUPPLEMENTAL GUIDANCE RELATED TO THE FDIC STATEMENT OF POLICY ON APPLICATIONS FOR DEPOSIT INSURANCE (2016), https://www.fdic.gov/news/news/financial/2016/fil16024.html [https://perma.cc/W5YC-ZUSB].

80. Kane et al., *supra* note 35.

81. Daniel H. Burd & John J. Spidi, *FDIC Holds De Novo Outreach Conference*, MARTINDALE (NOV. 16, 2016), https://www.martindale.com/banking-financial-services/article_Jones-Walker-LLP_2237152.htm [https://perma.cc/EF3J-D8TM].

82. *Id.*

83. Meinert, *supra* note 66.

84. *Id.*

85. *Id.*

86. FED. DEPOSIT INS. CORP., REQUEST FOR INFORMATION ON THE FDIC'S DEPOSIT INSURANCE APPLICATION PROCESS 8, https://www.fdic.gov/news/news/press/2018/pr18095a.pdf [https://perma.cc/CPP9-3T3X] (last visited Jan. 26, 2020).

87. *See Banker Task Force Shares Recommendations on Enhancing De Novo Process*, ABA BANKING J. (Aug. 3, 2018), https://bankingjournal.aba.com/2018/08/banker-task-force-shares-recommendations-on-enhancing-de-novo-process/ [https://perma.cc/CJ2W-RN4G] (describing the role of the banker task force in encouraging de novo bank formation).

FDIC with a "banker task force," a group of bank leaders with former de novo experience aiming to alleviate difficulties facing de novo formation.[88] The task force recently offered its proposed solutions to Chairman Jelena McWilliams, and cited regulatory issues as a significant issue in the de novo process.[89] Specifically, the "banker task force" pointed to the overall length of the application process as a remaining hindrance.[90] The FDIC's guidelines for processing a new bank's deposit insurance application present a sixty-day and 120-day time frame for the expedited and standard procedures, respectively.[91] However, because the processing clock only begins when the application is deemed "substantially complete," it takes longer than sixty days to get an application approved in practice.[92] FDIC guidelines mandate that the case manager reviewing the federal deposit insurance application should determine whether an application is "substantially complete" within thirty days after receipt.[93] However, according to one bank expert, an application is rarely determined to be "substantially complete" immediately after filing.[94] Therefore, even if the case manager reviews the application within thirty days after receipt, the application may not qualify as "substantially complete" until after thirty days, ultimately lengthening the application process.[95]

IV. THE FDIC'S SHORTCOMINGS AND CONGRESSIONAL ACTION SEEMINGLY ENHANCING THE PROBABILITY OF A SUCCESSFUL DE NOVO RETURN

Notwithstanding these FDIC efforts, there are still substantial obstacles for starting a new bank that fall outside of the FDIC's control,

88. *Id.*
89. *Id*.
90. *Id*.
91. FED. DEPOSIT INS. CORP., GENERAL APPLICATION PROCESSING TIMEFRAMES FOR REGIONAL OFFICES, https://www.fdic.gov/regulations/applications/application-processing-timeframes.pdf [https://perma.cc/DRF6-5S3C] (last visited Jan. 6, 2020).
92. DIV. OF RISK MGMT. SUPERVISION, FED. DEPOSIT INS. CORP., DEPOSIT INSURANCE APPLICATIONS: PROCEDURES MANUAL 11 (2019), https://www.fdic.gov/regulations/applications/depositinsurance/procmanual.pdf [https://perma.cc/CS6M-Y2EQ].
93. *Id.*
94. E-mail from Todd H. Eveson, *supra* note 64.
95. DIV. OF RISK MGMT. SUPERVISION, *supra* note 92; *see also* E-mail from Todd H. Eveson, *supra* note 64 (explaining that it generally takes longer than sixty days to gain application approval in practice).

starting with high capital requirements.[96] In fact, many within the banking community believe the high capital requirements present the most substantial hindrance to de novo formation.[97] However, the ABA's task force explained that believing these capital requirements can be lowered, in itself, presents an obstacle in the de novo formation process.[98] Recently, successful applicants gathered anywhere from $20 million to $40 million to meet their capital requirements.[99] One bank insider illustrates the difficulty of satisfying such requirements, describing the likelihood of finding $20 million to start a bank in a 5,000-person town, for example, as very low.[100]

Difficulty in hurdling high capital barriers is exacerbated by the current interest rate climate.[101] An investor's decision to fund, and therefore, a bank's ability to enter a market, is determined by expected profits to be earned from entry.[102] From an investor's perspective, the lending business likely appears unappealing with interest rates currently "squeezed," resulting in a low net interest margin.[103] These potential investors will likely find little solace in the current Federal Reserve Board, whose members clearly hold differing opinions regarding what

96. Clozel, *supra* note 44.

97. *Id*.

98. *Banker Task Force Shares Recommendations*, *supra* note 87.

99. R. Alan Deer, *De Novo Banks on the Rise*, BRADLEY (November 20, 2018), https://www.financialservicesperspectives.com/2018/11/de-novo-banks-on-the-rise/ [https://perma.cc/LJB5-MUVX]; *see* Paul Schaus, *It's Not Enough to Fix the De Novo Application Process*, AM. BANKER: BANKTHINK (Oct. 9, 2019, 9:00 AM), https://www.americanbanker.com/opinion/its-not-enough-to-fix-de-novo-application-process [https://perma.cc/Q2ZL-N9RX] (stating that although "[t]here's no minimum capital requirements that can serve as a guidepost," many recent applicants consider raising "at least" $15 to $20 million).

100. Clozel, *supra* note 44 (quoting David Baris, a partner at Buckley Sandler, who illustrates the difficulties associated with meeting capital requirements in a smaller town).

101. *See* Adams & Gramlich, *supra* note 6, at 3 (explaining that de novo banks' returns on loans dwindle during low interest rate periods); *see also Smart Things to Know About Sources of Income for a Bank*, ECON. TIMES, https://economictimes.indiatimes.com/wealth/save/smart-things-to-know-about-sources-of-income-for-a-bank/articleshow/54377370.cms [https://perma.cc/X4GJ-RWJK] (last updated Sept. 19, 2016, 6:30 AM) (describing interest earned on loans as the primary source of income for commercial banks).

102. Steven A. Seelig & Tim Critchfield, *Merger Activity as a Determinant of De Novo Entry into Urban Banking Markets* 9 (Fed. Deposit Ins. Corp., Working Paper No. 1, 2003).

103. Wayne Abernathy, *Actual Change in De Novo Policy Proving Hard for FDIC*, AM. BANKER: BANKTHINK (Sept. 6, 2016, 8:30 AM), https://www.americanbanker.com/opinion/actual-change-in-de-novo-policy-proving-hard-for-fdic [https://perma.cc/JM8S-MHMY].

direction the federal funds rate should go.[104] As of late September 2019, the Federal Reserve cut interest rates a quarter point, to a target range of 1.75% to 2%, before again lowering the bench mark interest rates to the current range of 1.5% to 1.75%.[105] If further cuts are in store, net interest margins—particularly for new banks—are certain to continue suffering as a result.[106]

Nevertheless, bank profitability should increase following the recent corporate tax rate cuts.[107] Investors, then, may be more accepting of risks associated with de novo banks if there is potential for higher after-tax returns on equity investments from capital gains.[108] Further, for corporations investing in de novo banks, lower marginal rates result in smaller personal tax payments, which frees up additional money for investment.[109] Ultimately, it would appear that investors should be better able and more incentivized to invest in a more profitable banking industry following the corporate tax cut.[110] However, the corporate tax rate cuts do not help banks profit any more than other companies benefiting from the lower corporate tax rate.[111] Therefore, because in the short-term new banks, particularly in a low interest rate environment, suffer from low net interest margins, and in the long-run the net interest margin is at the mercy of a federal funds rate controlled by an unpredictable Fed, investors may be more inclined to invest in non-bank institutions.[112]

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104. Victoria Guida, *Divided Fed Cuts Rates a Notch,* POLITICO, https://www.politico.com/story/2019/09/18/federal-reserve-cuts-interest-rates-1501881 [https://perma.cc/3B4U-MMN3] (last updated Sept. 18, 2019, 4:41 PM).

105. *Id.*; Jeanna Smialek, *Federal Reserve Cuts Interest Rates for Third Time in 2019*, N.Y. TIMES (Oct. 30, 2019), https://www.nytimes.com/2019/10/30/business/economy/federal-reserve-interest-rates.html [https://perma.cc/U77B-MKS2].

106. *See* Adams & Gramlich, *supra* note 6, at 12 ("[N]ew banks have greater exposure to current interest rates, while incumbent banks have diversified portfolios of loans and securities with varying yields and interest rates (and have lower holdings of federal funds).").

107. Burns, *supra* note 9 (describing the beneficial role of recent tax reform on the likelihood of new bank formation and profitability).

108. *Id.*

109. *Id.*

110. *Id.* (quoting Tony Plath, a finance professor at the University of North Carolina at Charlotte, stating "[t]ax reform helps create the sort of economic environment and investor climate that favors the creation of more startup banks, especially in states that are healthy, growing and business-friendly").

111. *See* David Floyd, *Explaining the Trump Tax Reform Plan*, INVESTOPEDIA, https://www.investopedia.com/taxes/trumps-tax-reform-plan-explained/ [https://perma.cc/D9C4-MGL7] (last updated Jan. 20, 2020) (explaining that the Tax Cuts and Jobs Act (TCJA) benefits both banks and "other" corporations).

112. Adams & Gramlich, *supra* note 6, at 12; *see* Guida, *supra* note 104 (characterizing the Federal Reserve as "divided" regarding monetary policy).

When considering the above, in combination with the detrimental impact compliance costs can have on a smaller bank's profitability, it appears logical that investors may choose to forgo investing in a de novo bank.[113] However, through the Economic Growth Act ("EGA") enacted in May of 2018, efforts are being made to lower these compliance burdens.[114] In fact, North Carolina's first community bank entrant in a decade, American Bank & Trust, categorized the EGA in their offering circular as "an attempt to provide regulatory relief to smaller . . . financial institutions."[115] Whether directly or indirectly, the EGA has the potential to assist the de novo banking industry.[116]

First, Title II of the EGA contains provisions directly assisting community banks through deregulation.[117] For example, upon the EGA's enactment, community banks are not subject to the Volcker Rule,[118] including its bans on proprietary trading.[119] The EGA also contains provisions aimed at simplifying capital rules for community banks,[120] and Section 101 of the Act provides community banks greater freedom when making decisions regarding its lending practices.[121] In addition to these benefits, community banks holding under $5 billion in total consolidated assets are subject to more lenient reporting requirements, and banks

113. *See* Floyd, *supra* note 111 (stating the Tax Cuts and Jobs Act (TCJA) benefits both banks and "other" corporations); *see also* Chacko, *supra* note 57 (describing the disproportionate effect of compliance costs on smaller banks).

114. *See* Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115–174, § 203, 132 Stat. 1296 (2018) (providing "[c]ommunity bank relief" under § 203 of the Act); *see also* Fields, *supra* note 9, at 373 (describing the Economic Growth Act's potential benefits for de nov o bank formation).

115. Caroline Hudson, *Charlotte Region's Startup Bank*, CHARLOTTE BUS. J. (May 21, 2019, 2:33 PM), https://www.bizjournals.com/charlotte/news/2019/05/21/charlotte-regions-startup-bank-becomes-ncs-first.html [https://perma.cc/5PDF-9E4V]; AM. BANK & TR., OFFERING CIRCULAR (2018).

116. *See* Fields, *supra* note 9, at 373 (stating that increasing the SIFI threshold should push BHCs with total assets slightly below $50 billion into acquiring de novo banks); *see also* Richard M. Alexander et al., *Passage of the Economic Growth Act*, ARNOLD & PORTER (June 1, 2018), https://www.arnoldporter.com/en/perspectives/publications/2018/06/passage-of-the-economic-growth-act-modifies [https://perma.cc/7X7G-QFUT] (listing the EGA provisions providing direct regulatory relief for community banks).

117. *See* Alexander et al., *supra* note 116 (describing the "community bank relief" provided under § 203 of the EGA).

118. The Volcker Rule prohibits banks from participating in various types of speculative investments. James Chen, *The Volcker Rule*, INVESTOPEDIA, https://www.investopedia.com/terms/v/volcker-rule.asp [https://perma.cc/29L4-G4S8] (last updated Dec. 9, 2019).

119. Alexander et al., *supra* note 116.

120. *Id*.

121. *Id*.

holding under $3 billion in total consolidated assets may extend the length of time in between regulatory examinations from twelve months to eighteen months.[122]

Second, looking to the EGA's indirect effects, prior to the EGA's enactment, financial institutions with $50 billion or more in total assets were automatically labeled systemically important financial institutions ("SIFI").[123] However, Section 165 of the EGA raised the $50 billion threshold at which an institution is automatically labeled a SIFI to $250 billion.[124] It is no surprise that bank holding companies sought to avoid this SIFI designation due to the additional regulatory costs associated with it.[125] Therefore, bank holding companies were less willing to undertake M&A activity that pushed them above the $50 billion mark.[126] Now that financial institutions can surpass this $50 billion threshold without receiving the SIFI label, however, financial institutions with slightly less than $50 billion in total assets are in a prime position for M&A activity.[127]

Theoretically, a friendlier M&A environment is great news for the de novo banking landscape for two reasons.[128] First, due to "personnel efficiencies and consolidations," senior officers of acquired banks normally sell their stock and lose their jobs.[129] Therefore, as mergers increase, once these senior officers' non-compete agreements expire, they can use their banking experience and capital to form their own de novo banks.[130] Second, investor optimism, and therefore, incentive for formation, should increase as newly formed banks are more

122. *Id*.

123. *See* Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115–174, § 165, 132 Stat. 1296 (2018) (substituting the $50 billion threshold for SIFI designation with $250 billion); *see* Fields, *supra* note 9, at 360 (explaining that Section 165 of the EGA raised the SIFI designation threshold from $50 billion to $250 billion).

124. *Id*.

125. *See* David C. Ingles & Sven G. Mickisch, *Increase in SIFI Threshold Should Spur More Bank M&A Activity*, SKADDEN (Apr. 25, 2018), https://www.skadden.com/insights/publications/2018/04/quarterly-insights/increase-in-sifi-threshold-should-spur-more-bank [https://perma.cc/B232-C8VN] (explaining that bank holding companies labeled as SIFIs face "stricter oversight and more burdensome regulatory requirements, including the Federal Reserve Board's enhanced prudential standards").

126. *Id*. (stating that the EGA's provisions should lead bank holding companies "benefiting from this legislation . . . to take a renewed interest in M&A . . . .").

127. Fields, *supra* note 9, at 368.

128. *See id*. (explaining the benefits of a friendlier M&A environment for the de novo banking landscape).

129. *Id.* at 373.

130. *Id*.

likely to be acquired by bank holding companies, now able to increase their total assets above $50 billion without fear of SIFI designation.[131]

Despite these theoretical benefits, although still in its early days, as of November 1, 2019, the EGA has not yet proven effective in promoting bank sales for premiums.[132] In fact, a little over a year after the EGA's enactment, premiums have fallen.[133] Through November 1 of both 2018 and 2019, premiums averaged 174% and 155% of a seller's tangible book value for that year, respectively.[134] Further, 2019 data indicates that the EGA has not yet spurred M&A activity as some predicted.[135] Excluding BB&T's merger with SunTrust, the aggregate value of bank M&A deals dropped 19% from November 2018 to November 2019.[136] In fact, leading up to November 2019, under 10% of sellers in these merger deals held over $1 billion in assets.[137] Considering over 90% of merger deals have involved the sale of banks holding less than $1 billion in assets, it is unlikely these acquiring banks moved to make such minimal additions to their total assets because of the $200 billion dollar increase in the SIFI designation threshold.[138] In other words, with such a relatively minimal increase in assets, it is likely the acquiring bank could have made such an acquisition prior to the EGA's enactment and remained under the SIFI designation.[139]

V. NORTH CAROLINA'S FUTURE DE NOVO BANKING LANDSCAPE

Ultimately, those looking to enter the banking industry may find that buying an already existing bank presents a cheaper and easier route than going through the de novo charter process.[140] In fact, North

131. *Id.* at 368.
132. Davis*, supra* note 10.
133. *Id*.
134. *Id*.
135. *See id.* (comparing M&A activity throughout the banking industry in 2018 to that in 2019).
136. *Id*.
137. *Id*.
138. *See id.* (explaining that the majority of bank sellers involved in 2019 M&A deals held a relatively low value of assets).
139. *See id.* (explaining that the majority of bank sellers involved in 2019 M&A deals held a relatively low value of assets).
140. *See* Jeff Gerrish, *Can America Grow New Banks Again*?, BANKING EXCHANGE (Jan. 25, 2017, 4:53 PM), http://m.bankingexchange.com/blogs-3/community-banking-blog/item/6677-can-america-grow-new-banks-again [https://perma.cc/JPJ4-ZU52] (listing the advantages of buying an established bank as opposed to applying for a de novo bank charter); *see also* Ken McCarthy, *Proposed North Carolina De Novo Withdraws Application*,

Carolina's banking industry exemplifies the difficulties associated with starting a de novo bank.[141] As of May 2019, the state has only witnessed one de novo bank, American Bank & Trust, successfully established within the past decade.[142] By contrast, the state's banking industry experienced several de novo applications withdrawn.[143] These withdrawals are likely attributed to difficulties in raising adequate capital.[144] Such difficulties are particularly onerous when multiple de novo efforts are concentrated in one geographic area, as there are only so many potential investors available.[145] Consequently, Spirit Community Bank in Statesville, Dogwood State Bank in Raleigh,[146] and Community Bank of the Carolinas in Winston-Salem,[147] all withdrew their charter applications. Looking specifically at Dogwood State Bank, in May of 2019, Dogwood State withdrew its application with the North Carolina Office of the Commissioner of Banks and the FDIC, electing to instead recapitalize Sound Bank in Morehead City, NC.[148]

Nevertheless, North Carolina's Chief Deputy Commissioner of Banks, Rowe Campbell, explained that the recent increase in bank consolidation throughout North Carolina opened up the market for de novo entry.[149] Despite North Carolina's de novo difficulties, the numbers certainly appear to support this assertion, as North Carolina lost half of

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AM. BANKER (June 28, 2019, 2:12 PM), https://www.americanbanker.com/news/proposed-north-carolina-de-novo-withdraws-application [https://perma.cc/6SBV-F2UF] (explaining that those who backed Raleigh's Dogwood State Bank eventually chose to buy an established bank rather than submit a de novo charter application).

141. Hudson, *supra* note 115 (stating that North Carolina has seen only one de novo bank successfully established in the past decade).

142. *Id*.

143. Hilary Burns, *De Novo Activity's up, but Organizers Face Familiar Obstacles*, AM. BANKER (Jan. 24, 2019, 1:51 PM), https://www.americanbanker.com/news/de-novo-activitys-up-but-organizers-face-familiar-obstacles [https://perma.cc/8JLP-SGH6] [hereinafter *Obstacles*].

144. *Id*.

145. *Id*.

146. *Signs of Life in De-Novo Bank Activity*, BAUER FIN. (June 10, 2019), https://www.bauerfinancial.com/2019/06/10/signs-of-life-in-de-novo-bank-activity/ [https://perma.cc/YVL4-ZHUR].

147. McCarthy, *supra* note 140.

148. Joshua Recamara, *Dogwood State Bank Withdraws Application*, S&P GLOBAL (Nov. 30, 2018), https://www.spglobal.com/marketintelligence/en/news-insights/trending/O3L0MPm8ZkUjCR6JgzKDMA2*Sanchez*- [https://perma.cc/8JT9-3UJC]; Aaron Sánchez-Guerra, *Sound Bank Becomes Dogwood State Bank*, NEWS & OBSERVER (Oct. 7, 2019, 04:07 PM), https://www.newsobserver.com/news/business/article235820492.html.

149. *See De Novo Central*, *supra* note 12 ("We've had so much consolidation—there's definitely a market, a need and a desire [for community banking] in a lot of the communities.").

its banks since 2010.[150] Within the past three years alone, the North Carolina banking industry witnessed the sale of several regional banks to larger, out-of-state competitors.[151] Among the regional banks lost include: BNC Bancorp of High Point, Yadkin Financial Corp. of Raleigh, Capital Bank Financial Corp. of Charlotte, and Great State Bank of Wilkesboro.[152]

One bank insider explained that North Carolina's increased merger activity and subsequent community banking void has left business and community leaders longing for a return of local management complementary to community banking.[153] This is welcome news for de novo hopefuls, particularly when considered alongside the fact that many of the community banks chartered in the period prior to the 2008 Financial Crisis came about in markets undergoing bank consolidation.[154] If one bank insider is correct in his assertion that witnessing success in establishing a de novo charter will persuade others to try establishing their own bank, then American Bank & Trust could be the first of many new bank entrants.[155]

Some view BB&T's merger with SunTrust Bank, the largest merger announced in over a decade, as a potential precursor to a resurgence in North Carolina's de novo banking activity, particularly on the heels of recent FDIC regulatory changes.[156] Certainly this merger will add to the already pervasive consolidation striking North Carolina's banking industry,[157] but the impact of this megamerger remains unclear.[158] Bank customers who feel degraded to a nameless number are

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150. *De Novo Boom*, *supra* note 9.

151. Richard Craver, *Consolidation Spurs Renewed Interest in Startup Community Banks*, WINSTON-SALEM J. (Mar. 18, 2018), https://www.journalnow.com/business/consolidation-spurs-renewed-interest-in-startup-community-banks/article_2b3ce350-bfc4-5d9d-a8da-516564e1916f.html [https://perma.cc/S9MD-WJ55].

152. *Id.*

153. *Id*.

154. *See* Yan Lee & Chiwon Yom, *The Entry, Performance, and Risk Profile of De Novo Banks* 2 (Fed. Deposit Ins. Corp. & Ctr. for Fin. Research, Working Paper No. 3, 2016), https://www.fdic.gov/bank/analytical/cfr/2016/wp2016/2016-03.pdf [https://perma.cc/SC6J-SMVX] (finding that many of the de novo charters established from 2000 to 2008 formed in markets undergoing bank mergers or acquisitions).

155. *See De Novo Boom*, *supra* note 9 (pointing to the potential benefits of a successfully established de novo bank for the rest of the de novo banking landscape).

156. *De Novo Wave*, *supra* note 11.

157. *See* Craver, *supra* note 151 (illustrating instances of recent bank consolidation within North Carolina).

158. *De Novo Wave*, *supra* note 11 (describing the potential effects of the BB&T-SunTrust merger on North Carolina's de novo banking landscape).

more likely to cease their relationship with that bank.[159] Therefore, generally, it is the larger competitor bank buying the smaller community bank that triggers local investors to reestablish the personal touch of a de novo bank that is often lost in a larger bank.[160] However, the BB&T-SunTrust merger presents different circumstances.[161] In terms of total assets, BB&T and SunTrust are currently the thirteenth and fourteenth largest banks in the United States, respectively, and each hold approximately $165 million in total customer deposits.[162] Although the BB&T-SunTrust merger will produce the sixth largest bank in the United States,[163] customers of each bank are likely already familiar with this type of large bank relationship. Therefore, it may be more likely that Truist customers will find themselves used to the level of customer service presented, allowing the merged bank to retain its former BB&T and SunTrust customers.[164]

Despite uncertainty regarding customer reaction to the BB&T-SunTrust merger, as the largest merger announced in over a decade,[165] efficiency considerations will likely push senior officers of both BB&T and SunTrust out of the newly formed Truist, and once these senior

159. *The Banking Customer Experience Report*, QUALTRICS, https://www.qualtrics.com/customer-experience/banking-report/ [https://perma.cc/XQ59-57XX] (last visited Jan. 28, 2020) ("[C]ustomers will leave within 14 months if they don't have a good experience, and 56% of customers looking to leave say their bank hasn't made an effort to keep them from switching."); *see also* Shep Hyken, *Businesses Lose $75 Billion Due to Poor Customer Service*, FORBES (May 17, 2018, 5:30 AM), https://www.forbes.com/sites/shephyken/2018/05/17/businesses-lose-75-billion-due-to-poor-customer-service/#6ccba13c16f9 [https://perma.cc/4KGL-EHE9] (providing the results from NewVoiceMedia's 2018 report stating that 67% of customers will consider switching "brands" due to unpleasant customer service).

160. Craver, *supra* note 151 (quoting Lee Burrows, chief executive of Banks Street Partners of Atlanta, stating "[i]t is that time in the life cycle of community banks that many of the community banks have merged with other larger organizations, leaving business and community leaders desirous of a local bank with local decision makers").

161. *See* Erin Oneil, *The Biggest Banks in the United States*, BALANCE, https://www.thebalance.com/the-big-4-us-banks-315130 [https://perma.cc/3BKL-7BRY] (last updated Nov. 20, 2019) (showing that Branch Banking & Trust Corp. and Sun Trust Banks Inc. represent the thirteenth and fourteenth largest banks in the United States, respectively).

162. *Id*.

163. Ben Lane, *Truist Is Here*, HOUSING WIRE (Dec. 9, 2019, 1:41 PM), https://www.housingwire.com/articles/truist-is-here-bbt-suntrust-complete-merger/ [https://perma.cc/PM3W-ABX3].

164. Kyle Nazario, *These Are the 5 Largest Banks in America*, ATLANTA JOURNAL-CONSTITUTION (June 12, 2019), https://www.ajc.com/business/these-are-the-largest-banks-america/Hk2QNM6nQdZTwNlLxvn8EM/ [https://perma.cc/DQ55-6NYZ] (stating that Truist will be the sixth-largest bank in the United States); Gerrish, *supra* note 140.

165. *De Novo Wave*, *supra* note 11.

officers' non-compete agreements expire, they can use their banking experience and capital to form their own de novo banks.[166] Such expectations are reflected in one bank expert's analysis that the logical candidates to start de novo banks in North Carolina are the market presidents or city executives from BB&T or SunTrust.[167] So ultimately, it appears at least some industry participants feel this merger could serve as a catalyst for a resurgence in North Carolina de novo banking activity.[168]

VI. ACTIONS THE FDIC AND NEW DE NOVO BANK MANAGEMENT SHOULD TAKE TO ENSURE A NEWLY ESTABLISHED BANK'S SUCCESS

The FDIC has arguably been successful in promoting initial investor interest in the prospect of acquiring a new bank charter.[169] Since the FDIC demonstrated its newfound willingness to accept de novo bank applications for FDIC insurance in 2016,[170] this upswing in interest has shown in the numbers.[171] In fact, the FDIC received more applications in 2016 than in the four prior years combined.[172] The FDIC must now consider the proposals of the ABA banker task force to ensure de novo success past just the application submission stage.[173] Specifically, the FDIC must clarify expectations regarding how long application review will take; consider reconfiguring the rate cap constraining de novo banks, as the current rate cap[174] prevents their ability to attract deposits; make clear that the FDIC's de novo manual will determine capital requirements; and establish a de novo team at the FDIC focused solely on overseeing applications.[175]

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166. Fields, *supra* note 9, at 373; *see also De Novo Wave*, *supra* note 11 (explaining that former BB&T or SunTrust officers represent probable candidates to establish de novo banks).

167. *De Novo Wave*, *supra* note 11.

168. *Id*.

169. *See* Clozel, *supra* note 44 (describing the "demonstrated uptick in interest for new bank charters" amid FDIC promotional activity and regulatory changes).

170. Kane et al., *supra* note 35.

171. *See* Clozel, *supra* note 44 (stating that the FDIC received eight applications in 2016).

172. *Id.* (stating that the FDIC received eight applications in 2016).

173. *See Banker Task Force Shares Recommendations on Enhancing De Novo Process*, *supra* note 87 (describing the banker task force's recommendations to the FDIC for promoting de novo bank expansion).

174. THE INDEP. CMTY. BANKERS OF AM., ICBA POLICY RESOLUTION, https://www.icba.org/advocacy/policy-resolutions/brokered-deposits-and-the-fdic's-national-deposit-rate-caps [https://perma.cc/MU3T-6HVY] (last visited Feb. 7, 2020).

175. *Banker Task Force Shares Recommendations on Enhancing De Novo Process*, *supra* note 87.

The FDIC should also use its supervisory role to ensure the stability of de novo banks once they are established.[176] To do this, the FDIC must monitor risk-taking behavior and encourage proper risk management procedures.[177] The FDIC could additionally consider limiting de novo reliance on non-core sources of funds, an influential factor in recent de novo failures, as well as limiting loan concentration.[178] Apart from setting limits, the FDIC should continue educating new banking institutions on relevant issues, through analysis such as that found in the FDIC's issuing of "Managing Commercial Real Estate Concentration."[179]

Along with FDIC action, de novo bank management should take steps both during the business planning stage and once their new bank is established to ensure a healthy existence.[180] As discussed above, many bankers currently consider the high capital requirement the most substantial hindrance in the de novo formation process.[181] However, a 2018 Igler and Pearlman review explains that reconfiguring a bank's growth plan may reduce this apprehension regarding capital requirements.[182] This is because a conservative growth plan encompassing realistic goals over an institution's first three years requires less capital than a more aggressive growth strategy, since the amount of capital needed is a fraction of the bank's asset size and

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176. *See* FED. DEPOSIT INS. CORP., *supra* note 7 (explaining that the FDIC presides over approximately four thousand banks and savings banks for "operational safety and soundness").

177. Lee & Yom, *supra* note 154, at 14 (describing the negative impact excessive risk-taking had on de novo banks formed in advance of the 2008 Financial Crisis).

178. *See id.* (characterizing those de novo banks dependent upon non-core funding and investing deeply in C&D lending prior to the 2008 Financial Crisis as "financially fragile" compared to their "small established" counterparts).

179. *See* FED. DEPOSIT INS. CORP., MANAGING COMMERCIAL REAL ESTATE CONCENTRATIONS, https://www.fdic.gov/regulations/examinations/supervisory/insights/siwin07/article02_real_estate.html [https://perma.cc/ZW42-82KW] (last updated Dec. 7, 2007) (providing banks with valuable information regarding commercial real estate lending).

180. *See* Paul Nadler, *De Novo Banks Need Top Talent, Not Just Cash Series: 6*, AM. BANKER (Jan. 4, 1987), https://search-proquest-com.libproxy.lib.unc.edu/docview/292867607?OpenUrlRefId=info:xri/sid:summon&accountid=14244 [https://perma.cc/9KRJ-986H] (recommending the steps necessary for maintaining a healthy de novo bank); *see also* IGLER & ANGERER, *supra* note 25, at 4 (explaining the positive impact that forming a "realistic plan for growth" has on a de novo bank's chances for success).

181. Clozel, *supra* note 44 ("Bankers, meanwhile, said the biggest obstacle is neither the de novo application process nor interest rates, but the high capital requirements for institutions.").

182. IGLER & ANGERER, *supra* note 25, at 4.

composition.[183] Therefore, a business plan that projects the bank will reach $300 million in assets within its first three years will necessitate much greater capital than more realistic projections to reach $150 million to $200 million in assets.[184]

Finally, upon the de novo bank's establishment, management should make sure to: (i) hire better talent, even if it means paying higher salaries; (ii) maintain a close-knit board passionate about their role both within the bank and greater community; (iii) select a competent chief executive officer familiar with the area; (iv) garner enough capital initially to maintain the ability to make significant loans and withstand the early years of little to no profit without having to raise additional capital in order to comply with examiners' requirements; and (v) lastly, remember that success in receiving a charter does not necessarily equate to success as a bank.[185]

VII. CONCLUSION

Following the 2008 Financial Crisis, the rate of new bank entry throughout the United States plummeted.[186] Whether this decline resulted from increased regulatory oversight throughout the banking industry, or from non-regulatory factors such as interest rates,[187] the FDIC and Congress are working to reignite de novo formation.[188] However, if high capital requirements currently present the most substantial hindrance in successful de novo entry,[189] the FDIC and Congress, although able to spur interest in applying for new bank charters, are fairly limited in their ability to assist in actual de novo formation.[190] Therefore, those looking to enter the banking industry may

183. *Id*.

184. *Id.*

185. Nadler, *supra* note 180.

186. MCCORD ET AL., *supra* note 20.

187. Adams & Gramlich, *supra* note 6, at 2–3.

188. *See* Clozel, *supra* note 44 (stating that there has been a "demonstrated uptick in interest for new bank charters" amid FDIC promotional activity and regulatory changes); *see also* Fields, *supra* note 9, at 373 (describing the Economic Growth Act's potential benefits for de novo bank formation); *see also* Craver, *supra* note 151 (characterizing Congress's recent federal corporate tax rate cut as an "advantage" for banks).

189. Clozel, *supra* note 44.

190. *See Banker Task Force Shares Recommendations on Enhancing De Novo Process*, *supra* note 87 (explaining that believing these capital requirements can be lowered in itself presents an obstacle in the de novo formation process); *see also* Obstacles, *supra* note 143 (explaining that difficulties in raising capital are exacerbated when multiple de novo efforts are concentrated in one geographic area); *see also* FED. DEPOSIT INS. CORP., *supra* note 7

find that buying an already existing bank presents a cheaper and easier route than going through the de novo charter process.[191] However, if a de novo resurgence is to occur, its best chance of success likely lies in states such as North Carolina, where bank consolidation has left a substantial void in the community banking market.[192]

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(stating that the FDIC's primary roles include insuring bank deposits, overseeing bank compliance with various laws, and responding to certain bank failures); *see also* Floyd, *supra* note 111 (stating that the Tax Cuts and Jobs Act (TCJA) benefited both banks and "other" corporations).

191. *See* Gerrish, *supra* note 140 (listing the advantages of buying an established bank as opposed to applying for a de novo charter); *see also* McCarthy, *supra* note 140 (explaining that those who backed Raleigh's Dogwood State Bank eventually chose to buy an established bank rather than submit a charter application).

192. *See* Lee & Yom, *supra* note 154, at 1 (finding that many of the de novo charters established from 2000 to 2008 formed in markets undergoing bank mergers or acquisitions); *see also* Craver, *supra* note 151 (quoting Lee Burrows Jr., chief executive of Banks Street Partners of Atlanta, as stating "[i]t is that time in the life cycle of community banks that many of the community banks have merged with other larger organizations, leaving business and community leaders desirous of a local bank with local decision makers").

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