United States Senate
WASHINGTON, DC 20510

December 8, 2023

The Honorable Martin Gruenberg
Chairman
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Dear Chairman Gruenberg:

We write to you today regarding the May 1, 2023 purchase and assumption agreement that the Federal Deposit Insurance Corporation ("FDIC") arranged in order to facilitate the sale of First Republic Bank, including $203 billion in assets and all of the failed bank's deposits, to JPMorgan Chase.[1]

While First Republic's executives—who failed to properly manage risk and hedge against rising interest rates as the Federal Reserve quantitatively tightened throughout 2022 and 2023—bear the primary responsibility for this failure, the actions undertaken to resolve the failed bank, and the later obfuscation surrounding the terms, are just as concerning.

Not only did the seizure and sale of First Republic result in a $13 billion loss to the FDIC's Deposit Insurance Fund ("DIF")—which will be disproportionately borne by regional banks and their customers—federal regulators also utilized a legal loophole to ignore viable bids, and instead helped the nation's largest bank grow even bigger.[2]

While in 1994 Congress passed the Riegle-Neal Interstate Banking and Branching Efficiency Act ("Riegle-Neal"), which prevents regulators from approving bank mergers that would result in the acquiring institution controlling more than 10 percent of deposits nationwide, the FDIC and other federal regulators chose to waive this requirement through an exception for acquisitions of failing or failed banks.[3]

Neither Riegle-Neal, the Dodd-Frank Act ("Dodd-Frank"), nor the Bank Holding Company Act prescribe official mechanisms for waiving this requirement, and the waiving of the 10 percent

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[1] Federal Deposit Insurance Corporation (FDIC), "JPMorgan Chase Bank, National Association, Columbus, Ohio Assumes All the Deposits of First Republic Bank, San Francisco California," May 1, 2023, https://www.fdic.gov/news/press-releases/2023/pr23034.html.

[2] *See* Special Assessment Pursuant to Systemic Risk Determination, 88 Fed. Reg. 83333 (November 29, 2023), 12 C.F.R. Part 327. https://www.fdic.gov/news/board-matters/2023/2023-11-16-notational-fr-b.pdf; Randall S. Kroszner, "A Review of Bank Funding Cost Differentials," October 2013, https://www.stern.nyu.edu/sites/default/files/assets/documents/con_044532.pdf; Anna Kovner, James Vickery, and Lily Zhou, "Do Big Banks Have Lower Operating Costs?" December 2014, Federal Reserve Bank of New York, https://www.newyorkfed.org/medialibrary/media/research/epr/2014/1412kovn.pdf.

[3] 12 U.S.C. §1842(d)(2)(A); 12 U.S.C. §1842(d)(5)(A)

nationwide deposit cap is not necessarily a cause for concern on its own. However, the FDIC also received multiple other viable bids for the takeover of the failed bank, including from a number of substantially smaller regional banks, with reporting indicating that these came from PNC, Fifth Third, and Citizens Bank.

The FDIC has stated that the resolution of First Republic Bank "resulted in a transaction consistent with the least-cost requirements of the Federal Deposit Insurance Act,"[4] and in private conversations with Senator Vance, you have indicated a bid spread of $20 billion. However, Senator Vance's office has learned from government officials and industry leaders, who have purported to be privy to the auction process, that the final spread between JPMorgan's bid and the next most viable bid was likely closer to $1 billion. If true, this would be concerning given that retrospective reviews of past bank resolution cost estimates have been found to be extremely imprecise – sometimes off by billions of dollars.[5] Error margins in the range of the $1 billion could very well account for the difference between what has been deemed the least-cost bid from one bank and bids from other banks. Senator Vance's office was also informed that the initial offers may have included a bid that would have potentially been less costly to the DIF than JPMorgan's, but the FDIC allegedly indicated this bid was too complicated to pursue.

Additionally, the FDIC itself recently waived the least-cost test—through invoking the systemic risk exception—in the resolution of Silicon Valley Bank ("SVB") in order to fully backstop the failed bank's uninsured depositors.[6] While the FDIC and other federal regulators have argued that the failure of SVB posed potential contagion risks in the broader banking sector, the FDIC approached the auction process for SVB far differently than First Republic. Reporting indicated that your agency initially excluded our nation's largest banks from bidding for SVB.[7] And while you've pointed to the least-cost test as why your agency sold First Republic to JPMorgan, it's not clear that a $1B difference in bids would justify the FDIC's decision.

In June of this year, the Senate Banking Committee passed the RECOUP Act, which includes an amendment patching the Dodd-Frank created loophole for the 10 percent nationwide deposit cap. While we urge Congress to pass this provision expeditiously, this legislative effort does not abdicate you from accountability for your decision to grow a Too Big Too Fail Bank instead of allowing regional banks to compete.

As members of the Senate Committee on Banking, Housing, & Urban Affairs, we request that you promptly provide clarity surrounding the reasons for the FDIC's decision, your following

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[4] Federal Deposit Insurance Corporation (FDIC), "JPMorgan Chase Bank, National Association, Columbus, Ohio Assumes All the Deposits of First Republic Bank, San Francisco California," May 1, 2023, https://www.fdic.gov/news/press-releases/2023/pr23034.html.
[5] Federal Deposit Insurance Corporation, "Meeting Closed Session," Minutes of Board of Directors Meeting, September 29, 2008, p. 10, https://fcic-static.law.stanford.edu/cdn_media/fcic-docs/2008-09-29_FDIC_Board_of_Directors_Meeting_Closed_Session.pdf; In correspondence on file with the Office of Senator Elizabeth Warren, FDIC staff clarified that "$5.6 million" was included in the minutes in error, and that the actual cost estimate was $5.6 billion to $7.2 billion.
[6] Federal Deposit Insurance Corporation (FDIC), "Joint Statement by the Department of the Treasury, Federal Reserve, and FDIC," March 12, 2023, https://www.fdic.gov/news/press-releases/2023/pr23017.html.
[7] Liz Hoffman and Gina Chon, "Why the biggest banks were first shut out of bidding on Silicon Valley Bank," *Semafor*, March 14, 2023, https://www.semafor.com/article/03/14/2023/largest-us-banks-first-shut-out-of-silicon-valley-bank-bid.

obfuscation, and answers to the following questions and requests for information, no later than December 22, 2023:

1. Please turn over the details and terms of all purchase and assumption offers and final bids for First Republic, both successful and unsuccessful;

2. Please provide the FDIC's reasoning and legal rationale for accepting bids for First Republic from institutions already exceeding the 10 percent nationwide deposit cap while initially excluding those same institutions from putting forward offers for the purchase and assumption of SVB. Additionally, please include any market analysis conducted regarding the competitive impact to consumers from the resultant sale to JPMorgan Chase compared to other bids and offers from institutions falling below the 10 percent nationwide deposit cap.

3. Please explain why you indicated to Senator Vance a $20 billion spread between bids;

4. Was there another bid resulting in a spread closer to $1 billion?

5. If the final bid spread was in fact closer to $1 billion, did the FDIC allow that bank with the next most viable bid a chance to provide a counteroffer against JPMorgan's bid?

6. While we do not know the details of the bids placed for First Republic, it has come to our attention that there may have been an initial offer that could have been less costly to the DIF than JPMorgan's. It has also been communicated that the FDIC refused this offer, explaining that it was too complicated, and instructed the offering bank to resubmit their offer with new terms.
    a. If this is indeed true, could you please explain why this bid was too complicated?
    b. Regardless of the complex nature of said bid, please explain the FDIC's reasoning for refusing to consider an offer that could have reduced taxpayer losses.

Sincerely,

JD Vance	Elizabeth Warren
U.S. Senator	U.S. Senator