June 14, 2024

Chief Counsel's Office
Attention: Comment Processing
Office of the Comptroller of the Currency
400 7th Street SW, Suite 3E–218
Washington, DC 20219.

RE: Proposed Changes to OCC's Statement of Policy Concerning Business Combinations Under the Bank Merger Act [Docket ID OCC-2023-0017; RIN 1557-AF24]

Dear Acting Comptroller Hsu,

The Independent Community Bankers of America (ICBA)[1] appreciates the opportunity to respond to the Office of the Comptroller of the Currency's (OCC) proposed policy statement summarizing the principles the OCC uses to review proposed bank merger transactions under the Bank Merger Act (BMA).[2] As we have argued in previous letters to the OCC and the other federal prudential banking regulators, the current bank merger review process is outdated and in need of significant substantive revisions. Therefore, we welcome this opportunity to continue the dialogue on how the process can be improved both for community banks and for the consumers and communities they serve.

At a high level, we believe the current merger review process produces inconsistent outcomes and misallocates agency resources by overzealously scrutinizing smaller mergers between community banks, especially in rural markets, while also insufficiently scrutinizing mergers and acquisitions by very large "Too Big to Fail" banks and acquisitions of community banks by non-bank acquirers, including credit unions. Therefore, we urge the agencies to expedite the review of small mergers between community banks that do not pose systemic risks while also increasing the scrutiny applied to mergers that would result in an institution with greater than $100 billion in assets or acquisitions of banks by credit unions and other non-banks.

[1] The Independent Community Bankers of America® has one mission: to create and promote an environment where community banks flourish. We power the potential of the nation's community banks through effective advocacy, education, and innovation. As local and trusted sources of credit, America's community banks leverage their relationship-based business model and innovative offerings to channel deposits into the neighborhoods they serve, creating jobs, fostering economic prosperity, and fueling their customers' financial goals and dreams. For more information, visit ICBA's website at www.icba.org.

[2] 89 Fed. Reg. 10010, available at: https://www.govinfo.gov/content/pkg/FR-2024-02-13/pdf/2024-02663.pdf.

Overview of Recommendations to Improve the Proposal

ICBA is concerned the proposed changes to OCC's business combination procedures and policy will do little to speed up the review process and, in fact, may delay approval in some cases. The vast majority of bank mergers between traditional community banks are not complex and do not meaningfully impact competition in the business of banking or create additional risks to financial stability. Therefore, an expedited community bank approval process is appropriate for these mergers. To better ensure that changes to the OCC's merger framework do not unnecessarily delay or disadvantage community banks, ICBA recommends the following:

1) **Work with the Federal Reserve Board, FDIC, and DOJ to create unified, interagency bank merger guidelines and an interagency statement of policy:** Because bank mergers often require approval by multiple regulators, it is difficult, time-consuming, and costly for applicants to navigate multiple stand-alone agency frameworks that are often inconsistent with one another. To promote consistency among all agencies involved in reviewing mergers, the OCC should coordinate with the other federal prudential banking agencies and the Department of Justic (DOJ) to create a unified set of rules and prevent regulatory arbitrage.

2) **Do not eliminate expedited reviews and streamlined applications**: The vast majority of transactions among community banks are deserving of expedited reviews and streamlined applications – especially if the transactions do not raise unique supervisory concerns and adverse public comments have not been filed.

3) **Raise the asset threshold for applications consistent with approval from $50 billion in assets to $100 billion in assets:** Mergers involving large regional banks or "Too Big to Fail" banks are inherently more complex, pose greater risk to the financial system, and warrant additional regulatory scrutiny. However, the proposed $50 billion threshold is too low because it may capture applications between larger but non-complex community banks that do not create or pose significant systemic risk to the financial system.

4) **Eliminate the proposed indicator that applications consistent with approval will feature the target's combined total assets as less than or equal to 50% of the acquirer's total assets:** This proposed guideline disfavors mergers of equals between similarly sized community banks while favoring acquisitions by larger institutions.

5) **Transactions resulting in institutions below $10 billion in assets should automatically be deemed to not pose a risk the stability of the banking system:** Absent other factors, mergers of institutions under this size do not result in a material increase in risks to financial system stability due to an increase in size of the combining institutions.

6) **Create a process for applying scrutiny to credit union acquisitions of community banks under the BMA's "convenience and needs of the community to be served" factor:** ICBA is deeply

concerned about the growing trend of tax-exempt credit unions acquiring tax paying community banks. Because credit unions are also exempt from the Community Reinvestment Act (CRA), the OCC should ensure that any credit union acquiring a bank is committed to serving the convenience and needs of the community at least as well as the purchased bank – including by continuing to meet the credit and community development needs of the bank's assessment areas on an ongoing basis.

7) **Apply a higher HHI threshold in rural markets:** Using a higher HHI threshold in rural markets will present a more realistic assessment of competition.

OCC should collaborate with other agencies to create unified, interagency bank merger guidelines and an interagency statement of policy.

Bank mergers often require the approval of multiple agencies. For example, the Federal Deposit Insurance Corporation (FDIC) must approve any acquisition of an FDIC-insured institution and the OCC must approve any acquisition involving a national bank or savings association. The Federal Reserve Board must approve acquisitions involving state member banks or bank holding companies. Additionally, DOJ provides the responsible federal banking agency with a report on the competitive factors of the proposed merger and may unilaterally leverage the federal antitrust laws to bring separate suits or inquiries involving bank merger applicants. Indeed, some transactions require approval from these four separate federal agencies, in addition to state banking commissions.

Currently, the OCC and FDIC have independently requested public comment on proposed revisions to their respective BMA regulations.[3] The Federal Reserve Board is not proposing to amend its BMA regulations currently.

In our view, a revision to bank merger guidelines is appropriate, but it should be done on an interagency basis so that the entire industry is bound by one set of rules that are simple to understand. If each agency proceeds with its own approach to reviewing mergers, it will only make the process more opaque for industry and the public.

The fact that multiple agencies' approvals are required for even routine bank mergers underscores the need for a unified approach. If each agency has its own policies and practices and bank merger guidelines, the already cumbersome process of reviewing bank mergers will become exponentially more difficult. If community banks must expend significant resources to navigate the application process, with no guarantees their applications will ultimately be approved, community banks will continue to be deterred from exploring mergers that could ultimately better position the banks to serve their local communities.

[3] *See* FDIC, "Request for Comment on Proposed Statement of Policy on Bank Merger Transactions" PR-17-2024 (March 21, 2024) available at: https://www.fdic.gov/sites/default/files/2024-04/2024-03-21-notice-dis-b-fr.pdf.

The current review process for non-complex transactions is too slow - OCC should not eliminate expedited reviews and streamlined applications.

Currently, OCC's expedited review procedures provide that an application that qualifies as a business reorganization (e.g. the acquisition of a subsidiary by a national bank) or as a streamlined application is deemed approved as of the 15th day after the close of the comment period, unless the OCC notifies the applicant that the filing is not eligible for expedited review, or the expedited review process is extended.

Now, however, the OCC intends to remove the expedited review procedures and the streamlined applications process. OCC justifies their removal by stating, in part, "any business combination subject to a filing under § 5.33 is a significant corporate transaction requiring OCC decisioning, which should not be deemed approved solely due to the passage of time."[4] Further, OCC's proposal asserts that the elimination of streamlined applications is justified because the agency has discretion necessary to expedite the consideration of unproblematic mergers and "information requested in the Interagency Bank Merger Act Application may be tailored as appropriate."[5]

ICBA strongly opposes the elimination of expedited review and streamlined applications. While we understand the agency's view that every BMA transaction is significant, not every transaction is complex. For example, in instances where two community banks within the same market attempt to merge, and the merger does not pose significant financial stability, consumer protection, competition or safety and soundness concerns, the OCC should treat the transaction as non-complex and permit for review under streamlined procedures.

In our conversations with community banks across the country, we repeatedly hear that the merger review process is too slow, and that the merger review timeline can be unpredictable. Delay and uncertainty are significant barriers for community banks considering mergers which might otherwise allow them to better serve their customers by gaining scale, offering new services, and improving their financial condition. Eliminating expedited review would only serve to delay approval of mergers that do not pose significant risks to competition or financial stability or deter such mergers from ever being proposed.

As an alternative to completely eliminating streamlined and expedited reviews, ICBA proposes the OCC create a *de minimis* exception where mergers between institutions that are both below $1 billion in assets remain eligible for streamlined application and expedited review. It is unreasonable to conclude that a merger between banks of this size could credibly result in a bank that could exercise monopoly power or pose significant risk to the stability of the financial system. Absent serious red flags, there is no reason that mergers of this size between traditional community banks should not be entitled to an expedited review that aligns with the relative non-complexity of these transactions.

[4] 89 Fed. Reg. 10011.
[5] *Ibid.*

Raise the asset threshold for applications consistent with approval from $50 billion in assets to $100 billion in assets

The OCC proposes to explicitly state in the newly added Policy Statement that a resulting institution having total assets less than $50 billion would generally be consistent with approval. While ICBA commends the OCC for adopting a brightline threshold, under which merger applications would generally be consistent with approval, we believe that the threshold should be increased to $100 billion in assets. This would enable mergers that may be necessary between large community banks in order to compete with their regional bank and money center bank competitors. Banks of this size may still maintain a traditional community bank business model, albeit at a larger scale, and are unlikely to create systemic risk.

In contrast to combinations with resulting institutions having total assets less than $100 billion, ICBA believes that resulting institutions exceeding that threshold should receive additional scrutiny. Mergers that result in an institution of this size are more likely to lead to increased systemic risk. As we saw from the failures of Silicon Valley Bank and Signature Bank, failures of banks of this size can result in reduced confidence in the banking system and lead to systemic risk. It is not our view that banks above this threshold should never be permitted to merge – indeed, it may be necessary to allow larger banks to act as a buyer in order to avoid the failure of a troubled bank – however, the OCC should view mergers above this threshold skeptically.

Eliminate the proposed indicator that applications consistent with approval will feature the target's combined total assets as less than or equal to 50% of the acquirer's total assets.

In addition to the absolute asset threshold indicator discussed above, the OCC's proposed Policy Statement also sets out a brightline ratio of the target's assets compared to the acquirer's assets. If the target's combined total assets are less than or equal to 50% of acquirer's total assets, then the Proposed Policy Statement would consider that an indicator of an application that is generally consistent with approval.

ICBA believes that this proposed indicator would unduly benefit larger banks that target smaller competitors. Of more concern, if this indicator is adopted, it would disfavor the mergers of equals. Mergers between community banks of comparable size do not generally warrant additional scrutiny because they may be necessary to gain the scale required to comply with increasingly complex regulations or to offer enhanced products and services to consumers. Accordingly, ICBA strongly recommends that this indicator be omitted from the final Policy Statement.

Transactions resulting in institutions below $10 billion in assets should automatically be deemed to not pose a risk the stability of the banking system

The Bank Merger Act requires the OCC to consider "the risk to the stability of the United States banking or financial system" when evaluating a bank merger.[6] The proposed Policy Statement would include consideration of whether the proposed transaction would (i) result in a material increase in risks to financial system stability due to an increase in size of the combining institutions, (ii) result in a reduction in the availability of substitute providers, (iii) create an institution that would engage in businesses that creates risks to other institutions, (iv) result in an institution that increases the complexity of the financial system, (v) materially increase the extent of cross-border activities of the combining institutions, and (vi) would increase the relative degree of difficulty of resolving the resulting institution in the event of failure or insolvency. It would also create a balancing test where the OCC would consider "whether the proposed transaction would provide any stability benefits and whether enhanced prudential standards applicable as a result of the proposed transaction would offset any potential risks."[7]

The Policy Statement's proposed approach to evaluating risk to the stability of the financial system is largely appropriate, as proposed. However, ICBA strongly encourages the OCC to automatically deem all applications where the resulting institution is below $10 billion in assets as transactions that do not pose a risk to financial stability. The agency should not expend its scarce resources to scrutinize mergers below this threshold because the vast majority of banks of this size have limited geographic footprints and are unlikely to engage in business that poses risk to the broader financial system or even to other financial institutions.

Create a process for applying scrutiny to credit union acquisitions of community banks under the BMA's "convenience and needs of the community to be served" factor.

The BMA requires agencies evaluating a bank merger to consider the "convenience and needs of the community to be served" by the combined institution.[8] Historically, this analysis has focused public comments as well as on the merging parties' CRA ratings, fair lending record, and accessibility of banking services, including an evaluation of the likelihood of a merger to result in branch closures. The proposed Policy Statement reaffirms this approach.

Additionally, the agencies have closely scrutinized and discouraged potential mergers that result in branch closures of consolidation.[9] However, in some cases, especially where community banks with overlapping branch footprints seek to merge, it may be possible to consolidate branches that are close

[6] 12 U.S.C. § 1828(c)(5).
[7] 89 Fed. Reg. 10017.
[8] 12 U.S.C. § 1828(c)(5)(B).
[9] *See e.g.* 89 Fed. Reg. 10018. In evaluating convenience and needs the agencies consider "any plans to close, expand, consolidate or limit branches or branching services, including in low- or moderate-income (LMI) areas" and any "job losses or reduced job opportunities from branch staffing changes, including branch closures or consolidations."

to one another without meaningfully reducing the accessibility of branch banking for consumers. In addition, the cost savings associated with branch consolidation in these cases may increase the ability of the resulting bank to extend more credit or to provide digital products and services that benefit consumers.

Separately, however, we believe the agencies should use the BMA's statutory mandate to consider how a prospective merger impacts the "convenience and needs of the community to be served" to create a more formal process for reviewing how credit union acquirers of national banks and savings associations will continue to serve the convenience and needs of the resulting institution's community. Unlike banks, tax-exempt credit unions are not subject to the CRA and have no binding regulatory obligation to meet the credit needs of their entire community.

ICBA is concerned that when tax-exempt credit unions purchase tax-paying community banks, the community is less well-served because unlike community banks, credit unions do not have an ongoing obligation to lend in low- and moderate-income census tracts or to meet the needs of small businesses. Lending to small businesses in the bank's assessment area is particularly likely to decrease after a credit union acquisition of a community bank due to credit union limits on small business lending.[10] Finally, because credit unions do not have any requirement to meet the community development lending and investment needs of an acquired bank's assessment areas, it is reasonably foreseeable that qualifying activities, like affordable housing finance, are likely to decrease post-acquisition.

In addition to CRA concerns, ICBA is also concerned with the lack of fair lending scrutiny that credit unions receive. While FDIC reviews thousands of banks for compliance with fair lending laws every year, NCUA conducts approximately 50 annual fair lending exams of federal credit unions, with state credit unions receiving no federal scrutiny. It is possible that this relative lack of scrutiny may lead to a greater number of undetected fair lending violations if credit unions continue to acquire community banks.

In the past, credit union acquisitions of banks were rare. However, so far in 2024, 12 credit union acquisitions of community banks have been announced, which is approximately 25% of all bank merger activity, year-to-date. This is no longer a niche issue or uncommon occurrence. Given credit unions' sizable share of the bank acquisition market, ICBA strongly believes that the OCC needs to establish procedures that account for the disparate regulatory treatment of credit unions, particularly given their lack of CRA coverage and lack of fair lending exams.

[10] Credit union business lending is constrained by the member business loan cap, which prohibits credit unions from making "any member business loan that would result in a total amount of such loans outstanding at that credit union at any one time equal to more than the lesser of – (1) 1.75 times the actual net worth of the credit union; or (2) 1.75 times the minimum net worth required [by statute]." 12 USC 1757a(a). Though there are several exceptions and loopholes that allow credit unions to circumvent this legal limit, community banks are still the industry leaders in the small business lending market.

ICBA recommends that when a credit union proposes to acquire a bank, that bank's primary federal prudential regulator should evaluate the credit unions retail lending to LMI borrowers and in LMI census tracts. It should also review the credit union's small business lending, and lending that would count for community development credit as defined in the CRA's implementing regulations. Finally, it should review publicly available HMDA data, or request the submission of additional data if HMDA data is not available, in order to assess whether the acquiring credit union is at risk of fair lending violations. Without conducting this analysis, it is not credible for the OCC to conclude that a credit union acquiring a bank will serve the convenience and needs of the community at least as well as the bank that it purchases.

The OCC should also include credit unions in its HHI calculations when evaluating bank mergers because relaxation of field of membership restrictions means they are able to act as full-fledged competitors to banks. Credit unions compete directly with banks in the market for loans and federally insured deposits and should be a part of the consideration of how concentrated a market is.

Apply a higher HHI threshold in rural markets

Community banks operating in rural markets have an inordinate difficulty securing expedited approvals to merge. In these markets, there are frequently fewer financial institutions, which leads to very large HHI changes when two in-market banks merge. This often leads the agencies to erroneously conclude that a merger between two very small banks poses a risk to competition. By contrast, if a much larger bank or credit union from outside of that market wanted to purchase a small bank in a rural market, it would not receive the same scrutiny because the number of "competitors" in that market would not change.

The agency should consider using a higher HHI threshold in rural markets so that fewer merger applications among community banks are considered threats to competition. In addition, as mentioned above, the agencies must consider competition from credit unions, the farm credit system, and online banks when evaluating mergers in rural areas as these are significant sources of actual competition for rural community banks and are often viewed as interchangeable alternatives by consumers.

Conclusion

ICBA appreciates the OCC's decision to create a publicly available Policy Statement that provides greater transparency into its bank merger review process. While ICBA disagrees with some of the proposed changes, such as the elimination of expedited reviews and streamlined applications, we believe this proposal is an appropriate starting point. Specifically, we appreciate the agency's decision to classify mergers that result in a very large bank as less likely to be consistent with approval.

Under the current system, too much scrutiny is expended on small mergers between rural community banks and insufficient scrutiny is applied to mergers and acquisitions by very large regional, super-regional, and "Too Big to Fail" banks. This is not only an OCC problem – and we once again renew our

call for the federal banking regulators to create an interagency set of merger guidelines. Any new guidelines should simplify community bank mergers by fixing the market definition problems associated with smaller and rural market mergers – specifically by including credit union and non-bank competition as part of its HHI screen. Additionally, the OCC should work with other federal banking regulators to create a formal process to assess credit union acquisitions of community banks and to ensure that CRA-exempt buyers will truly meet the convenience and needs of their communities.

Finally, we encourage the OCC to use this opportunity to finalize an expedited review process for non-complex mergers among community banks – streamlined reviews are a good feature of the current framework and should not be removed to the detriment of community banks that operate and grow responsibly.

If you have any questions about the positions stated in this letter, please feel free to contact us at Chris.Cole@icba.org or Mickey.Marshall@icba.org.

Sincerely,

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