MID-SIZE BANK COALITION OF AMERICA

April 15, 2024

Via Electronic Submission: www.regulations.gov

Office of the Comptroller of the Currency
400 7th Street, SW, Suite 3E-218
Washington, DC 20219

Re: Business Combinations under the Bank Merger Act (Docket ID OCC–2023–0017)

Ladies and Gentlemen:

The Mid-size Bank Coalition of America (**MBCA**) welcomes the Office of the Comptroller of the Currency's (**OCC**) notice of proposed rulemaking regarding the standards that the agency applies to its review of business combinations involving national banks and Federal savings associations, including the associated proposed policy statement.[1] The MBCA represents more than 100 mid-size banks across the country, with over 13,000 branches in all 50 states, Washington, D.C., and three U.S. territories. MBCA members hold over $2.6 trillion in deposits and have extended over $2.1 trillion in loans while employing over 300,000 people. Mid-size banks are an integral component of the nation's economy, typically serving as hometown banks with highly personal connections to their clients, and we write to share this unique perspective as mid-size banks.

The proposal is critically important to our members, given the need for more clarity and certainty on the standards and procedures that apply to bank merger reviews. The proposed standards, however, would have the opposite effect of introducing unclear and ambiguous policies – potentially chilling healthy merger activity. Boards of directors of acquiring and target institutions would be faced with the prospect of considering transactions, including the associated operational and reputational risks, without being able to clearly evaluate whether an application will be acted upon and decided in a timely manner, due to these ambiguities. Another area of uncertainty would be whether the OCC will give undue weight to unsubstantiated legal actions or frivolous complaints. Ultimately, this ambiguity could discourage healthy mergers in a way that would be detrimental to the safe and sound and sustainable operation of the banking sector.

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[1] "Business Combinations Under the Bank Merger Act," 89 Fed. Reg. 10,010 (Feb. 13, 2024).

Mid-size banks today are faced with acute economic and regulatory pressures, including higher funding costs and growing competition from digital and larger banks. Our members need the ability to grow, to achieve scale, and to leverage operational efficiencies wherever possible in order to effectively compete. The proposal, however, is likely to place further strain on the competitiveness of mid-size banks by deterring beneficial business combinations.

To achieve a more sustainable approach, the MBCA has four recommendations.

- First, the proposed policy statement should make clear that transactions that do not meet one or more of the indicators "consistent with approval" may nonetheless be approved by the agency. That is, the OCC should make clear that there is no presumption against approval for such transactions. In its current form, the policy statement could be read to suggest that a transaction is unlikely to be approved unless all these indicators are met.

- Second, the proposed statement should be revised to avoid a focus on size in a manner that would be contrary to current industry dynamics.

- Third, any final guidelines should clarify that the agency will not consider unsubstantiated legal or enforcement actions or frivolous complaints or concerns from the public.

- Fourth, the policies should not provide the OCC with discretion to pick winners and losers and effectively engage in industrial policy design by steering decisions regarding the workforce of a bank. The market, rather than the OCC, should determine how best to manage a bank's workforce. The proposal should focus instead on the statutory factors relevant for merger reviews under the Bank Merger Act (**BMA**).[2]

Each of these points is discussed in more detail below.[3]

The proposal should be revised to make clear that there is no presumption against approval for transactions that do not meet one or more of the indicators consistent with approval

The proposal includes 13 indicators that are "consistent with approval" and six indicators that "raise supervisory or regulatory concerns." The proposal does not address

[2] We also note that Section IV of the NPR release preamble makes specific reference to "the board management oversight structure." 89 Fed. Reg. at 10,014. We believe that the OCC did not intend to conflate the different oversight roles of directors and management described in its existing precedents and would support confirmation of this point in any final proposal.

[3] In addition, by incorporating the proposed policy statement as an Appendix to 12 CFR Part 5 rather than as stand-alone guidance (e.g., a Bulletin or revisions to the *Comptroller's Licensing Manual*), the agency would make legally enforceable general principles that are broadly open to interpretation.

mergers that do not fall squarely into either category. This ambiguity in the proposed policy casts uncertainty over a wide range of potential transactions.

The OCC should revise the proposed policy statement to remove the two-category approach (factors that are either consistent with approval or that raise supervisory concerns) and make clear that there is no presumption against approval for transactions that do not meet one or more of the indicators. For example, a literal reading of the proposed policy statement could lead to the conclusion that any transaction that would create a bank with $50 billion or more in total assets would not be approved.

In place of the two-category approach, the OCC should provide more transparency about how it reviews proposals that do not meet one or more of the indicators. These types of transactions, which could represent a majority of the applications, are the ones that will be critical to allowing the industry to consolidate in a way that increases competition and benefits consumers and small businesses. In articulating its policy for reviewing these transactions, however, the OCC should move away from the types of considerations used in the proposed guidelines and discussed below.

The proposal should be revised to avoid a focus on size, particularly at the $50 billion threshold level

One factor that is proposed as being generally consistent with approval is the resulting institution having total assets of less than $50 billion. In an industry where the largest banks have multiple *trillions* of dollars of total assets, a combination that creates a $60, $70 or even multi-hundred-billion-dollar institution would not be of a level of magnitude that reflects any material increase of risk to financial stability.[4] Furthermore, unduly focusing on size, particularly at the $50 billion threshold level, could discourage healthy business combinations and result in a less stable, less competitive and less dynamic banking sector.[5]

The OCC should revise the proposal such that bank size alone would not be a gating factor for any transaction, particularly at the $50 billion level. For example, if the OCC's intention is to signal that proposed transactions that would create a bank with $50 billion or more in total assets would be subject to a heightened level of due diligence, the

[4] Rather, as evidenced by the events of last March, in some cases it is necessary for larger banks to acquire failed banks under least-cost resolution. In addition, many banks in troubled condition seek out transactions with a healthy acquirer. The proposal is silent on whether the OCC will consider these exceptional circumstances.

[5] Indeed, Acting Comptroller Hsu expressed in his remarks immediately prior to the NPR release that concentration in the banking industry must be addressed "while also supporting and balancing the *diversity, dynamism*, and size of the U.S. economy" and that the agency intends to provide an increased level of transparency to "help promote a *diverse and dynamic* banking system." Acting Comptroller of the Currency Michael J. Hsu, "What Should the U.S. Banking System Look Like? Diverse, Dynamic, and Balanced," University of Michigan School of Business (Jan. 29, 2024). (emphasis added). The proposal would appear to be contrary these goals.

policy statement should make that clear, rather than suggesting that such applications are inherently inconsistent with approval.

The proposal would provide that a combination that is generally consistent with approval is one where the target's combined total assets is less than or equal to 50% of the acquirer's total assets (and therefore, by converse reasoning, a merger of equals would not be consistent with approval). It is not clear why an acquisition of a smaller target institution should be preferable. This ambiguity further stresses that the OCC should avoid overreliance on size metrics in its policies. Managerial capability, future market impact and supervisory record of the acquiring institution are all better indicators of successful business combinations. In fact, consideration of factors beyond size is statutorily mandated by the BMA, which states that "[i]n every case, the responsible agency shall take into consideration the *financial and managerial resources* and *future prospects* of the existing and proposed institutions, the *convenience and needs of the community* to be served, and the *risk to the stability of the United States banking or financial system*."[6]

Any final guidelines should clarify that the OCC will not consider unsubstantiated legal or enforcement actions or frivolous complaints or concerns from the public

Among the factors that are proposed as being generally consistent with approval is the acquiring bank having no open or pending fair lending actions, including referrals or notifications to other agencies. The threshold for making a fair lending referral to the Department of Justice (**DOJ**) is quite low and does not require a finding or a determination that a violation has in fact occurred. In addition, the time frames under which referrals are under DOJ review are often lengthy, uncertain, and unpredictable (with little to no transparency as to the status of the review). Referrals alone should not operate to preclude a business combination. Historically, the OCC has taken the position that outstanding or pending matters that can be resolved in the normal supervisory course should not bar an institution from pursuing M&A transactions. The OCC should not deviate from this standard.

Having no adverse comments that raise a significant Community Reinvestment Act (**CRA**) or consumer compliance concern is also among the factors that are in the approval category. Without a specified standard, this indicator could invite a flood of frivolous complaints or concerns to delay actions, particularly for high-profile proposals.[7] The MBCA encourages the OCC to consider alternative ways to indicate that significant adverse comments could lead to additional OCC review. At the very least, the OCC

[6] 12 U.S.C. § 1828(c)(5)(B) (emphasis added).

[7] The OCC also should consider whether including the $50 billion asset size threshold as a criterion for deciding to hold public meetings has potential to create similar delays in the agency's decision-making process.

should adopt the standard currently used to remove applications with adverse comments from expedited review.[8]

As proposed, the guidelines would provide the OCC with extensive discretion to engage in industrial and social policy design by steering decisions regarding the workforce of a bank; the proposal should focus only on the statutory factors relevant for merger reviews under the BMA.

The proposal sets new policy on the convenience and needs factor by allowing the OCC to consider job losses or reduced job opportunities as part of its analysis. The OCC has not previously articulated or identified job losses or reduced job opportunities as part of its decision-making process. Because it provides no additional context or quantification, the proposal would effectively grant the OCC extensive discretion to engage in industrial and social policy design and usurp management's authority to decide how to most efficiently run a bank.[9] It also would add substantial uncertainty for institutions contemplating a business combination, inconsistent with the agency's stated goals of increased transparency.

Our members of course support consideration of the impact that bank merger activity could have on the availability of banking services and take seriously the roles that banks play in their community. Those concerns, however, do not mean that an "ideal" size for the workforce of a bank should be a relevant consideration for a merger, particularly when that figure is taken in insolation. Instead, the OCC's policies should focus on the statutorily articulated factors in the BMA.

Conclusion

As the banking industry continues to adapt to an ever-changing economy, business combinations will play an important role in helping to ensure that banks can be the right size and operate at the right scale to facilitate a dynamic and competitive marketplace. The OCC's proposal, however, would be an impediment to that consolidation, as it introduces such significant uncertainty about how merger proposals will be reviewed. The proposal also introduces new standards that should not bear on the OCC's review. We encourage the OCC to consider the points in this letter before finalizing the proposed rulemaking and the proposed policy statement.

Finally, the MBCA is very concerned that the views expressed in the OCC's proposed policy statement differ in many important respects from the recent Proposed Statement of Policy on Bank Merger Transactions published by the Federal Deposit

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[8] 12 CFR 5.13(a)(2)(ii).

[9] The ability to derive operational efficiency and synergies are well-established considerations in bank M&A. The MBCA agrees that institutions should be mindful of the resulting impact on employees stemming from a business combination and our member banks, accordingly, have strategies in place to address this issue.

Insurance Corporation (**FDIC**).[10] We will also be commenting on the FDIC's proposal, but we urge the agencies to take a coordinated, interagency approach that provides for a single set of standards and criteria for acting on a bank merger application. A fragmented approach would only lead to further uncertainty for bank M&A transactions.

Should you have any questions or require any additional information, please do not hesitate to contact me at brent.tjarks@midsizebanks.com.

Respectfully submitted,

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[10] FDIC, "Request for Comment on Proposed Statement of Policy on Bank Merger Transactions," RIN 3064-ZA31 (Mar. 21, 2024).