American Bankers Association
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Via Electronic Submission

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

Attention: Comment Processing

RE: Office of the Comptroller of the Currency - Proposal to Increase the Transparency of the Standards that Apply to Reviews of Business Combinations under the Bank Merger Act - Docket ID OCC–2023–0017 (Proposal)

The American Bankers Association (ABA)[1] appreciates the opportunity to respond to the proposal by the Office of the Comptroller of the Currency (OCC) to amend its processing rules under the Bank Merger Act (BMA) and publish a policy statement (Policy Statement) consolidating its approach to assessing applications under the BMA from national banks and Federal savings associations (collectively, "institutions"). ABA's members comprise the entire range of the US banking industry and compete vigorously in diverse product and geographic markets to serve their customers. Preserving this diversity and enhancing delivery of financial services to the national economy is a central concern of both our industry and our nation's public policy.

ABA believes that a review of the regulations and guidelines for assessing applications under the BMA (and functionally similar applications under the Bank Holding Company Act of 1956), is important to the health of the US financial system and economy. Many aspects of these regulatory provisions are now at least 25 years old. In the intervening years, the market for financial products and services has undergone tremendous change, thanks to the rise of availability and use of online banking,[2] the interstate expansion of bank branch networks,[3] enhanced market access made possible by advertising and communication innovations, and the increased market presence of nonbank financial firms, including "fintechs." Because of these

[1] The American Bankers Association (ABA) is the voice of the nation's $23.7 trillion banking industry, which is composed of small, regional and large banks that together employ approximately 2.1 million people, safeguard $18.8 trillion in deposits and extend $12.5 trillion in loans.

[2] According to a FICO report, 80% of millennials use digital banking to check their account balance, 76% use digital banking to check their accounts for fraudulent charges and 65% use digital channels to make external transfers. *See* Millennial Banking Insights and Opportunities, FICO (2014)(retrieved from www.fico.com).

[3] Interstate branching was liberalized under the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Public Law No: 103-328 (108 Stat. 2338; Date: 9/29/94).

significant changes in the financial services market, the current regulatory approach of OCC, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the United States Department of Justice (DOJ) fail to account for significant competition in many product lines, including in many rural markets.

Accordingly, ABA supports OCC's goal of joining with the other banking agencies and DOJ in updating the assessment guidelines under the BMA. In principle, ABA strongly supports OCC's objective to go beyond retail deposits as a proxy for market power.[4] Nevertheless, much important remaining work lies ahead, and banks must be able to plan strategically under clear, transparent standards for the healthy growth and innovation of their institutions and the future delivery of service to their customers and communities.

For that reason, we write to highlight several aspects of the Proposal. In particular, for the reasons discussed below, ABA urges OCC to withdraw the proposed amendments to Section 5.33 of its rules, "Business combinations involving a national bank or Federal savings association."[5] We also note concerns with a number of other aspects of the Proposal:

- OCC should continue to permit streamlined BMA applications in circumstances currently allowed, since such transactions rarely present any of the issues that are the focus of the BMA.
- The Policy Statement's list of factors weighing for and against approval of an application requires further clarification to provide transparency and predictability for merger decisions.
- OCC's assessment of a proposed merger's impact on the convenience and needs of the community should be consistent with its evaluations of an institution's performance under the Community Reinvestment Act.
- If as proposed, OCC's actions on merger applications will depend in part on what other applications are pending, it must provide public notice and opportunity to comment on detailed standards for how another pending merger application would affect its decision-making process.

I. OCC should continue to permit streamlined BMA applications in circumstances currently allowed, since such transactions rarely present any of the issues that are the focus of the BMA.

OCC proposes to repeal the rule permitting an application for a "business reorganization"[6] to become effective 15 days after close of the comment period, unless OCC notifies the filer

[4] 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, January 29, 2024, p. 16, *available at* https://www.occ.gov/news-issuances/speeches/2024/pub-speech-2024-6.pdf (hereafter, "Hsu Remarks").
[5] 12 CFR §5.33.
[6] *See* 12 CFR §5.33(d)(3). A "business reorganization" is a transaction between depository institutions that are controlled by the same holding company or that will be controlled by the same holding company prior to the

otherwise.[7] The current rule applies the same timeframes (subject to the same OCC notification option) to transactions involving substantially less than all the assets of another depository institution, subject to the acquiring institution (and in some cases the other institution involved) meeting minimum supervisory conditions.[8] For this set of transactions (referred to as "ordinary course transactions"), the current rule permits use of a streamlined application form, subject to conditions, and OCC proposes to repeal use of this streamlined application also. In expedited applications that are not for business reorganizations, the filer is subject to various maximum amounts of assets to be acquired (expressed as a share of its own total assets), and in some cases it must receive prior OCC permission to use the streamlined procedures.

ABA urges OCC to retain these procedures to avoid imposing unnecessary regulatory burdens without justification and with no material improvement in meeting the BMA's statutory objectives. Because business reorganizations do not involve elimination of a competitor of any size, and because, unless they are part of a larger plan, ordinary course transactions leave the seller of the assets as a genuine, independent player in the relevant markets, such carefully circumscribed transactions do not present the competitive impacts with which the BMA is concerned. Furthermore, because ordinary course transactions are primarily available to institutions with strong supervisory ratings, they are unlikely to raise risks concerning other BMA statutory factors. In closer cases, the filer must have prior approval to take advantage of the streamlined procedures.

Against these rational risk mitigants is OCC's stated belief that, "that 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."[9] This philosophical position is not, as far as the Proposal indicates, based on any perception of increased risk, compared to the historical experience of transactions previously approved under Section 5.33(i). Nor does it reveal any increased benefits, in terms of the BMA's statutory factors or otherwise, that will accrue from the procedures and timeframes have been made more burdensome. Though the Proposal notes that, "[t]he principles currently articulated by § 5.33(i), such as certain transactions possessing indicators that are likely to satisfy statutory factors and do not otherwise raise supervisory or regulatory concerns, are contained within section II of [the Policy Statement] and will continue to guide OCC processing of business combination applications," the recent statements by banking agency principals and other senior policy spokespersons[10] leave one

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combination. The term also covers certain transactions in which a depository institution reorganizes in holding company form without a change in control. In this discussion, "depository institution" refers specifically to national banks and Federal savings associations, the entities over which OCC exercises supervisory and regulatory jurisdiction.

[7] Proposal at 10016. *See* 12 CFR §5.33(i).

[8] *See* 12 CFR §5.33(j).

[9] Proposal at 10011.

[10] *See, e.g.,* Hsu Remarks.

skeptical that many applications that would qualify under the current streamlined procedures will be approved within the same 15-day period after comments close.

Accordingly, OCC should withdraw the proposed amendments to Section 5.33.

II. The Policy Statement's list of factors weighing for and against approval of an application requires further clarification to provide transparency and predictability for merger decisions.

A. General Observations.

Section II of the Policy Statement lists the factors OCC would consider consistent with approval of a proposed merger transaction, including: (i) attributes regarding the acquirer's financial condition, size, Uniform Financial Institution Ratings System (UFIRS) assigned ratings or risk management, operational controls, compliance, and asset quality (ROCA) ratings, Uniform Interagency Consumer Compliance Rating System (CC Rating System) rating, Community Reinvestment Act (CRA) rating, the effectiveness of the Bank Secrecy Act/anti-money laundering program, and the absence of fair lending concerns; (ii) the attributes regarding target's size and status as a eligible depository institution, as defined in 12 CFR §5.3; (iii) the transaction clearly not having a significant adverse effect on competition; and (iv) the absence of significant CRA or consumer compliance concerns, as indicated in any comments or supervisory information.[11] Correspondingly, the Policy Statement includes OCC's belief that the presence of negative information for any of these items (e.g., poor ratings, unresolved enforcement actions, or failure to complete any required corrective actions) would be inconsistent with approval. In addition, the Policy Statement notes that the acquirer being a global systemically important banking organization or subsidiary thereof would also be inconsistent with approval. The Policy Statement also notes that the resulting institution having total assets less than $50 billion would generally be consistent with approval, raising the possibility that otherwise OCC would disapprove it.[12]

ABA recognizes that most (though not all) of these factors reflect logical application of the BMA statutory factors. The Policy Statement does not, however, expressly say that absence of any of the negative matters listed (or resolution of any that exist) will result in prompt approval, nor does it offer any indication of what "prompt" action on an application would be. Adding this acknowledgment to the Policy Statement – the fact that an absence or resolution of any or most of the listed concerns will expedite a positive decision on an application – would provide greater certainty and transparency to the process.

[11] Proposal at 10012.
[12] Proposal at 10016.

B. ***The use of an arbitrary size factor to cause virtually automatic disapproval is not warranted by the BMA and is inconsistent with Congressionally established policy.***

The Policy Statement's position that the acquirer being a global systemically important banking organization or subsidiary thereof being inconsistent with approval would establish an arbitrary size threshold not grounded in Congressional policy. Similarly, it implies that OCC would withhold approval solely because the resulting institution would have more than $50 billion in total assets. With respect to analysis of competition, Congress has already addressed the key aspect of large-bank concentration, prohibiting bank acquisitions that would result in a single banking organization controlling more than 10% of total insured deposits in the United States. As part of its approval of interstate bank acquisitions, Congress also limited deposit concentrations within States.[13]

ABA has long argued that deposit concentration is not the only measure of competition or of the competitive impact of a proposed merger, and OCC and other regulators will consider many other data points in assessing competition as and when they and DOJ update the guidelines for such assessments.[14] The key observation, however, is that Congress has drawn the bright line based on sized that it thought necessary, and if they are to be drawn at all, it is for Congress, not the banking agencies, to do so. Removing this factor from the Policy Statement's list of presumptive failure indications would not constrain OCC's ability to make all appropriate assessments under the BMA, without stepping beyond Congress's clear boundary.

C. ***OCC and other banking agencies should financial stability impacts of proposed mergers based on the systemic indicators already developed to measures such risks; any changes require extensive further research, exposure to public review and an opportunity for public comment.***

Section III of the Policy Statement sets out seven factors OCC will consider in assessing the impact of a proposed transaction on financial stability:

> 1. Whether the proposed transaction would result in a material increase in risks to financial system stability due to an increase in size of the combining institutions.
>
> 2. Whether the proposed transaction would result in a reduction in the availability of substitute providers for the services offered by the combining institutions.
>
> 3. Whether the resulting institution would engage in any business activities or participate in markets in a manner that, in the event of financial distress of the resulting institution, would cause significant risks to other institutions.

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[13] *See generally* 12 USC §1842(d)(2)(A) and (B).

[14] In addition, the size of the merger partners and the resulting institution will have implications for financial stability, discussed in detail below.

4. Whether the proposed transaction would materially increase the extent to which the combining institutions contribute to the complexity of the financial system.

5. Whether the proposed transaction would materially increase the extent of cross-border activities of the combining institutions.

6. Whether the proposed transaction would increase the relative degree of difficulty of resolving or winding up the resulting institution's business in the event of failure or insolvency.

7. Any other factors that could indicate that the transaction poses a risk to the U.S. banking or financial system.[15]

ABA believes that the assessment of financial stability concerns in connection with merger applications has been less than fully transparent, and it cannot (and should not) be reduced to a simple set of binary questions and answers. Though we generally believe that much additional research and public debate on this topic (as well as on broader considerations of financial stability) are necessary, in the near term we support use of factors already used in practice and that have previously been the subject of public notice and comment. The most sophisticated source of risk measurement is the list of systemic risk factors used to calculate the G-SIB Surcharge, set forth in 12 CFR, Part 217, Subpart H. These include:

(1) Total exposures;

(2) Intra-financial system assets;

(3) Intra-financial system liabilities;

(4) Securities outstanding;

(5) Payments activity;

(6) Assets under custody;

(7) Underwritten transactions in debt and equity markets;

(8) Notional amount of over-the-counter (OTC) derivatives;

(9) Trading and available-for-sale (AFS) securities;

(10) Level 3 assets;

(11) Cross-jurisdictional claims; and

(12) Cross-jurisdictional liabilities.[16]

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[15] Proposal at 10016-10017.
[16] 12 USC §217.401(y).

These factors are, of course, somewhat similar in appearance to the Policy Statement's list, but the key difference is that they are scored on a continuum. Using that approach, a transaction that exhibited aspects of some (or even all of) these factors would not be *per se* disapproved; its potential risks to financial stability would be scored and assessed against a standard. Obviously, the scoring methodology and any cut-offs would themselves require public notice and opportunity for comment. This approach would, however, avoid the need for bright-line tests that fail to measure actual risks.

D. Part of the potential financial stability impact of a given institution, including the resulting institution following a merger, depends significantly on the options available to the resolution authority in dealing with the institution's potential failure.

Obviously, the orderly resolution of a failing institution of any size, complexity, or degree of interconnectedness depends on how its resolution is handled. The Dodd-Frank Act provided new tools for handling complex resolutions, and FDIC has reorganized its resolution activities significantly in response. Nevertheless, the options for resolving such institutions require ongoing innovation and adequate public understanding. It is not possible to have a rational approach to assessing financial stability implications of a proposed merger without taking into account how it would be resolved. For many large institutions, resolution planning is already required at the level of either the parent company, the depository institution, or both.[17] The existence of a resolution plan, which would be updated for any material corporate change, usually including a merger, would address financial stability concerns for the resulting institution, just as it does for such institutions outside the merger context.

III. OCC's assessment of a proposed merger's impact on the convenience and needs of the community should be consistent with its evaluations of an institution's performance under the Community Reinvestment Act.

The Proposal observes that the BMA statutory factor for assessment impact on the convenience and needs of the community is legally distinct from the need to assess the institutions' performance under the Community Reinvestment Act (CRA).[18] Nevertheless, ABA believes that the two standards should be consistent, and that the CRA record should be the primary evidence that this factor is consistent with approval.

The Community Reinvestment Act requires the federal banking agencies to assess a financial institution's record of meeting the credit needs of its entire community, including low-and moderate-income neighborhoods, consistent with the safe and sound operation of that institution. To implement this requirement, the banking agencies have adopted a regulatory framework that evaluates a bank's lending performance across income stratifications and geographies. CRA examinations also assess a bank's branch distribution and other delivery channels, its community

[17] *See* 12 CFR, Part 243; 12 CFR §360.10.
[18] Proposal at 10014.

development investments, and its community development services. Together, these assessments provide examiners with a comprehensive picture of how a bank is serving the communities in which it is doing business.

For this reason, a bank's CRA performance should be the primary source of input concerning convenience and needs of the community, though banks in many cases will provide supplementary information. Since the size of an institution is already considered in the assessment of its CRA performance, the record of that performance already reflects the institution's size, and no further consideration of size is necessary or appropriate in assessing the convenience-and-needs factor in merger analysis.

The agencies are in the process of revising the CRA regulatory framework to reflect the digitization of banking. While ABA has expressed concerns with the revised regulation, we agree that the emphasis in CRA analysis on brick-and-mortar physical presence is outdated and should be revised. In addition to providing a more comprehensive view of a bank's CRA performance, expanding CRA examinations beyond a bank's physical location would help regulators have a more comprehensive view of how a bank is meeting the convenience and needs of its communities when evaluating merger applications. As such, CRA performance should continue to be a significant factor in merger determinations.

The convenience-and-needs assessment should consider planned branch closings and consolidations only to the extent that they would materially affect an already "satisfactory" CRA assessment (as defined under current standards). Therefore, unless material changes in activities that CRA measures are contemplated post-merger that would suggest material negative changes in future performance, the CRA performance rating should be taken as sufficient to address the convenience and needs factor in merger assessments, regardless of the size of the parties. OCC and the applicants could discuss in detail any proposed branch closings and other post-merger changes as part of the dialogue during the application review process.

IV. If as proposed, OCC's actions on merger applications will depend in part on what other applications are pending, it must provide public notice and opportunity to comment on detailed standards for how another pending merger application would affect its decision-making process.

Merger transactions clearly involve significant time, effort, expense, and public impacts well before a transaction receives all the required approvals, let alone before it is consummated, and the business integration process begins. Transaction parties devote considerable resources to meeting the needs of regulators and many other stakeholders in coordinating the steps from initiation of the transaction to its closing. Historically the factors relevant to regulators' decisions have been within the parties' knowledge, if not in all respects in their control. The possible impact of other transactions, conceivably including ones not yet publicly announced, will at

times be within neither the parties' knowledge nor their control. It could severely detract from safe and sound banking, as well as from the institutions' efficient service to their customers and communities, if their transaction hinges on factors of which they cannot reasonably take account.

Given the time, cost, and required resources for preparing for a merger and seeking approval from regulators and other stakeholders, and the impact of delay on the businesses concerned, OCC must be transparent about factors outside control of the applying institutions (such as other pending applications) that could materially affect the outcome.

Conclusion

ABA strongly supports OCC's and the other agencies' commitment to updating all aspects of the standards governing financial institution merger transactions. A more comprehensive analysis of competitive factors, beyond just deposit share based on physical branches, will provide an accurate picture of products and services available to customers and promote a healthy market and economy. A more granular and risk-sensitive approach to financial stability impacts assessment will not only rationalize the merger review process but will also promote a better general understanding of this critical topic. ABA appreciates OCC's consideration of the concerns we have raised, and we look forward to continuing discussion of these matters. Should you have any questions concerning the foregoing please do not hesitate to contact the undersigned at hbenton@aba.com.

Very truly yours,

/s/

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