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June 18, 2024

James P. Sheesley
Assistant Executive Secretary
Attention: Comments – RIN: 3064-ZA31
Federal Deposit Insurance Corporation
550 17th Street NW,
Washington, DC 20429

**RE: Proposed Changes to FDIC's Proposed Statement of Policy on Bank Merger Transactions [RIN: 3064-ZA31]**

To Whom It May Concern,

The Independent Community Bankers of America (ICBA)[1] appreciates the opportunity to respond to the Federal Deposit Insurance Corporation's (FDIC) proposed Statement of Policy (SOP) on bank merger transactions.[2] As we argued in previous letters to the FDIC and other federal prudential banking regulators, the current bank merger review process requires significant substantive revisions. Therefore, we welcome this opportunity to share our views on how the process can be improved both for community banks and for the communities they serve.

At a high level, the current merger review process is flawed, outdated, and fragmented. The merger review process produces contradictory and inconsistent outcomes and misallocates agency resources by over-scrutinizing mergers between small community banks, while insufficiently scrutinizing mergers by very large "Too Big to Fail" banks, including any financial institution that may be deemed systematically important, and acquisitions of community banks by non-bank acquirers. ICBA recommends a unified interagency approach to the Bank Merger Act (BMA) rather than each agency proposing its own sets of guidelines interpreting the same statutory factors.

To truly improve the merger review process, the FDIC must first recognize the underlying data informing the merger review process is flawed primarily because the data set is too narrow. The current merger review process (i) fails to adequately measure competition as it does not include a robust review of non-bank entities competing, but not necessarily physically based, in the bank's geographic market; (ii) does not sufficiently include different sources of competition outside of the community bank's geographic market; and (iii) does not sufficiently address the "convenience and needs" of a market as it narrowly focuses only on deposit data in the bank's market when it should take into account other sources through

[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. 29222, available at: https://www.govinfo.gov/content/pkg/FR-2024-04-19/pdf/2024-08020.pdf.

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which the needs of customers are met (*i.e.* lending and other non-deposit products). Measuring competition without these considerations is both antiquated and inaccurate.

Community banks need to be able to add scale to remain competitive. While the FDIC may be concerned about consolidation among insured depository institutions (IDIs), this concern does not justify the difficulties that small merging banks will encounter if this proposal is finalized. Rather than make the merger process more cumbersome for community banks, the FDIC must address some of the underlying causes of consolidation, which include the ever-rising cost of regulatory compliance, the steep challenges associated with technology adoption, and the dramatic decline in *de novo* activity since the 2008 financial crisis.[3] If the FDIC fails to address these issues, then community banks will face continued pressures to consolidate.

Finally, we urge the agencies to expedite the review of small mergers between community banks which 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 total consolidated assets or acquisitions of banks by non-banks.

**Overview of Recommendations to Improve the Proposed SOP**

The proposed SOP will not shorten the review process for community bank mergers and, in fact, is likely to cause further delay in most cases. The vast majority of bank mergers between traditional community banks are not complex and do not meaningfully impact competition 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 FDIC's BMA framework do not unnecessarily delay or disadvantage community banks, ICBA recommends the following:

1) **Work with the Board of Governors of the Federal Reserve System (Federal Reserve), Office of the Comptroller of the Currency (OCC), and the Department of Justice (DOJ) to create unified interagency bank merger guidelines and an interagency statement of policy and address the underlying causes of consolidation in the financial system.** 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 the agencies involved in reviewing merger application, the FDIC should coordinate with the other federal prudential banking agencies and the DOJ to create a unified set of rules and prevent regulatory arbitrage. This is particularly true since the Federal Reserve's predefined markets no longer resemble competition in fact. As one of the FDIC's rationales for revising the SOP is to address the impact consolidation in the financial system may have on maintaining a competitive marketplace,[4] it is critical for the FDIC to address the underlying reasons for such consolidation in order to address any impact.

2) **Take measures to provide clarity, predictability, and reduce existing burdens on small banks, and provide expedited approvals for small community bank mergers, including a small bank *de***

[3] Remarks by FDIC Vice Chairman Travis Hill at the Cato Institute on "Insights on the FDIC's Agenda," September 21, 2023, available at https://www.fdic.gov/news/speeches/2023/spsept2123.html.
[4] 89 Fed. Reg. 29222.

***minimis* exception.** ICBA recommends the FDIC take measures to reduce existing burdens on small bank mergers, including, but not limited to, creating a small bank *de minimis* exception to its bank merger framework to expedite agency review of mergers.

3) **Expand the scope of information to realistically reflect the bank's "true" competition and permit a small bank *de minimis* exception.** The marketplace for financial services can no longer be defined solely by geographic limits. While most community banks do not lend nationwide, the vast majority of community banks compete with financial institutions, including non-banks, that do operate nationwide.[5] Accordingly, the FDIC should adopt a true evaluation of competition in the bank's market taking all players and factors into account, and finalize a small bank *de minimis* exception whereby merger transactions among small banks are subject to faster agency review timeframes and are presumed to not create monopolies or anticompetitive effects.

4) **Expand the scope of the convenience and needs factors beyond deposit products in the bank's market and further specify the criteria that non-bank acquirers must satisfy to acquire banks.** The FDIC states it will consider concentrations beyond those based on deposits and may consider concentrations in any specific products or customer segments. Specificity is required on the scope of products to be reviewed and should include, at the very least, both deposit and loan products. Additionally, the FDIC should provide specific criteria that any credit union (or any other non-bank entity), acquiring a bank must satisfy for the convenience and needs factor. Credit unions compete with community banks because "field of memberships" are pliable and thus no longer limit the ability to attract customers, especially given their tax-exempt status. More balefully, as credit unions are generally limited by Congress in their ability to offer small business loans, credit union acquisitions of banks should be presumed to negatively impact consumers.

5) **Institutions with more than $100 billion in total consolidated assets should be subject to heightened scrutiny.** ICBA supports a merger framework that differentiates small bank mergers from mergers among large, complex financial institutions, and therefore we support heightened regulatory scrutiny for mergers that involve institutions with more than $100 billion in total consolidated assets.

**Discussion of ICBA Recommendations**

**FDIC should collaborate with other agencies to create unified interagency bank merger guidelines and an interagency statement of policy and address underlying causes of consolidation in the financial system.**

To promote consistency among the agencies involved in reviewing mergers and to provide clarity to applicants, the FDIC should coordinate with the other federal prudential banking agencies and the DOJ to create a unified set of rules. A single set of standards for acting on a bank merger application is necessary to accomplish both practical and policy goals. The current fragmented approach results in an uncertain outlook for bank merger transactions and creates real world problems for bank employees and customers who depend on and expect continuity in banking throughout the merger process. Additionally, lack of uniformity leads to a form of regulatory arbitrage as banks place an increased focus on choices of acquisition structures and bank charters in order to avoid a certain regulator/s given its/their evaluation

[5] Remarks by FDIC Vice Chairman Travis Hill at the Cato Institute on "Insights on the FDIC's Agenda," September 21, 2023.

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criteria. Currently, the OCC and FDIC separately requested public comment on proposed bank merger frameworks.[6] The Federal Reserve currently is not proposing to update its bank merger review framework. However, because Federal Reserve staff address most mergers, the only way to circumscribe the process is through interagency action.

A unified approach is critical since multiple agencies' approvals are required for any bank mergers (irrespective of size). If each agency has its own policies 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 predictability that their application will ultimately be approved, community banks will continue to be deterred from exploring mergers that would ultimately better position banks to serve their local communities. Predictability and transparency in the application process is essential.

Additionally, a unified approach is necessary to properly address the impact of consolidation in the financial system on competition in the marketplace, as noted in one of the rationales for revising the SOP.[7] In banking, as in every industry, there are a wide variety of reasons to engage in merger transactions. Mergers enable smaller banks to achieve economies of scale, expand into new markets, make larger loans and investments, offer expanded digital products and services, and a host of other valid business reasons. But in the banking industry, consolidation has largely occurred due to increasing regulatory burdens despite the 2020 FDIC study concluding otherwise.[8] This FDIC study predated the recent ramp up of regulatory burdens and lacked vigorous analysis. In fact, since this study was published, community banks are now subject to thousands of pages of additional regulation – from July through November 2023, the agencies published nearly 5,000 pages of rules and proposals.[9]

Ever-expanding compliance burdens continue to disproportionately pressure community banks, and we urge the FDIC, as well as the other federal prudential regulators, to be mindful of this reality as it develops and tailors new regulations. This is especially true of the need to work with the Federal Reserve, which has created predefined markets that no longer resemble actual market competition. The FDIC should more frequently re-evaluate the continuing issue of regulatory burden and specifically the disproportionate regulatory burden on community banks, in order to inform whether supervisory policy should be re-examined.[10] Also, increased regulatory burden and merger scrutiny for community banks that serve the underserved areas of their communities is blatantly inconsistent with the FDIC's emphasis on ensuring banks serve the convenience and needs of consumers in underserved areas. The impact of

[6] OCC, "Business Combinations Under the Bank Merger Act," 89 Fed. Reg. 10010, available at: https://www.occ.gov/news-issuances/federal-register/2024/89fr10010.pdf.

[7] 89 Fed. Reg. 29222.

[8] FDIC Community Banking Study – December 2020, available at: https://www.fdic.gov/resources/community-banking/report/2020/2020-cbi-study-full.pdf. The study states: "FDIC research indicates that more than 80 percent of the post-crisis decline in community bank profitability can be explained by negative macroeconomic shocks and that the net effects of regulation, business practices, and other 'structural' factors explain less than 20% of the post-crisis decline in profitability."

[9] "Remarks on the Economy and Bank Supervision and Regulation," by Federal Reserve Governor Michelle W. Bowman, November 7, 2023, available at: https://www.federalreserve.gov/newsevents/speech/bowman20231107a.htm.

[10] The Economic Growth and Regulatory Paperwork Reduction Act of 1996 requires the Federal Financial Institutions Examination Council and federal bank regulatory agencies to review their regulations every 10 years to identify any outdated or otherwise unnecessary regulatory requirements for their supervised institutions.

such misdirected policy, including provisions of the proposed SOP, is hurting community banks that service those very same consumers in underserved areas.

Accordingly, to the extent the FDIC is concerned about consolidation, rather than make the merger process more difficult, especially for small banks, the FDIC should work with the other federal prudential banking agencies to address the underlying causes of consolidation, which include, but are not limited to: (i) the ever-rising cost of regulatory compliance; (ii) the steep challenges and costs associated with technology adoption; and (iii) the dramatic decline in *de novo* activity since the 2008 financial crisis.[11] Regulators should make the process easier, not harder, as the driver for bank mergers is often due to economies of scale and reduction of cost pressures. Simply stated, within the banking industry consolidation has largely been the result of increasing regulatory burden. It is not hyperbolic to state that the increased regulatory burden, including the burden that the SOP will cause, is the main cause of the problem that the FDIC is claiming the SOP is attempting to address. Regulators need to evaluate their own actions that spur consolidation. Given one of the FDIC's rationales for revising the SOP is to address the impact consolidation may have on maintaining a competitive marketplace,[12] it is critical for the FDIC to address the underlying reasons for such consolidation. As recently noted by FDIC Vice Chairman Travis Hill:

> Using merger policy to address consolidation in the banking industry reminds me of trying to use price and wage controls to address inflation. In both cases, a combination of deeper economic forces and government policies fuel demand, and imposing restrictions on consolidation or prices without addressing the underlying drivers results in a range of undesirable economic inefficiencies. Meanwhile, if/when restrictions are lifted in the future, a vigorous unleashing of pent up demand quickly undoes the perceived benefits of the prior policy.[13]

**The current BMA review process is too slow, unpredictable and burdensome; the FDIC should take measures to provide clarity, predictability, and reduce existing burdens on small banks, and provide expedited approval for small community bank mergers.**

If the proposed SOP is implemented as proposed by the FDIC, the most significant impact for community banks will be: (i) longer processing times; (ii) additional competitive effects analysis that will be required with any such application; (iii) additional expense to comply with the additional requirements; (iv) greater uncertainty; and (v) new requests from the FDIC given the broad "principle-based" approach of the SOP. While the ICBA appreciates the need for a flexible principle-based approach, there needs to be predictability, fewer burdens, more specificity to provide real guidance to applicants, and a move away from the apparent (*and growing*) bias against bank mergers.[14] ICBA agrees with the heightened scrutiny of large bank mergers as noted in the proposed SOP because of the systemic risk imposed, and market power that can be exercised, by such institutions, but strongly proposes a different approach for small

[11] Remarks by FDIC Vice Chairman Travis Hill at the Cato Institute on "Insights on the FDIC's Agenda," September 21, 2023.
[12] 89 Fed. Reg. 29222.
[13] Remarks by FDIC Vice Chairman Travis Hill at the Cato Institute on "Insights on the FDIC's Agenda," September 21, 2023.
[14] Statement by Jonathan McKernan, Director, FDIC, Board of Directors, on the Proposed Statement of Policy on Bank Merger Transactions, March 21, 2024, available at: https://www.fdic.gov/news/speeches/2024/spmar2124b.html.

bank mergers as they do not pose the same risks or have the same impact on competition as large bank mergers.

*Deficiencies of the Current Regulatory Process*

As stated by FDIC Vice Chairman Travis Hill, the FDIC's current application process too often breaks down, takes far too long, has too many hurdles, and is too unpredictable.[15] Too often, the process can be damaging for the institutions involved, as they lose employees and customers, and, if the merger is approved, extended delays can make integration more challenging. If the target institution is in a vulnerable state, lengthy timelines can be dangerous, as the institution's condition may deteriorate while the application is in limbo. Furthermore, if the merger is ultimately denied, there may be no alternative options left, as no other potential buyers want to risk waiting more than a year just to get an answer.[16] Bank regulatory agencies need to overcome their reluctance to use expedited and emergency processing to accelerate mergers involving a troubled community bank that again does not impose the diseconomies of mergers involving systematically interconnected banks.

In addition, the comment period can cause additional delay in the process. While ICBA supports a comment period to allow a community's voice to be heard, the comment process should not be unduly burdensome or introduce undue delay on the parties to the proposed transaction. We have received feedback from community banks in which certain "serial commenters" abuse the comment period process and often use the process to extort banks. The FDIC needs to implement a vetting procedure and criteria for submitting a comment and not automatically consider each and every comment as warranting the same consideration; such a blanket approach to the comment period process causes undue delay in the application and review process. Therefore, if both banks involved in a proposed transaction have outstanding/satisfactory Community Reinvestment Act (CRA) ratings, any comment letter that attacks the banks' CRA efforts should be met with heavy skepticism by the FDIC; it should not automatically derail the application process and timeline as it does now.

*Need for More Specificity and Fewer Unnecessary Regulatory Burdens*

The SOP is too broad to provide meaningful guidance to applicants. The SOP provides general circumstances that will lead to unfavorable findings, but such circumstances are too ambiguous. For instance, under the SOP if any party is in "non-compliance with applicable federal or state statutes, rules or regulations (this includes, for example, transactions that would exceed the 10 percent nationwide deposit limit, as well as both issued and pending enforcement actions)," such a circumstance will present significant concerns and will likely result in an unfavorable finding.[17] In the current era in which supervisory recommendations and matters requiring attention have proliferated in the industry, any feature of the merger framework that leaves open the possibility that the agency could delay approval based on "non-compliance with applicable federal or state statutes" will inevitably introduce delay. The SOP should not create the proverbial "exception that swallows the rule." Absent additional specificity in the SOP, it is unclear, for example, whether a CAMELS-3 rating and Memorandum of Understanding (MOU) that is addressed and resolved at the bank's next examination could be interpreted by the FDIC as

[15] Remarks by Vice Chairman Travis Hill on the FDIC's Proposed Statement of Policy on Bank Merger Transactions, March 21, 2024, available at https://www.fdic.gov/news/speeches/2024/spmar2124c.html.
[16] *Id.*
[17] 89 Fed. Reg. 29227.

a history of non-compliance that leads to an unfavorable finding.

Further, the SOP advises applicants to be prepared to make commitments regarding future retail banking services in the community to be served for at least three years following consummation of the merger, and places an affirmative expectation on applicants to provide “specific and forward-looking information” to enable the FDIC to evaluate the expected impact of the merger on conveniences and needs of the community to be served. The proposed SOP should provide additional guidance or parameters surrounding this requirement. Gathering “forward looking information” is unnecessary when the CRA rating and fair lending practices of the parties are satisfactory – and, if this requirement does not also apply to credit union or non-bank applicants, collecting this information only for banks provides the FDIC with incomplete information that is nevertheless costly to gather and report.

Given the “principle-based” approach to evaluating statutory factors under the BMA, the SOP does not provide any explanation of the weight attached to various factors as part of the FDIC’s evaluation of applications. Such a broad stroke approach to guidance provides little direction, let alone helpful direction, to participants in the market when determining which factor is more determinative than another and where the regulatory emphasis will be in connection with a proposed transaction.

**The current competitive analysis framework is unrealistic – the FDIC should expand the scope of information to realistically reflect the bank’s “true” competition and permit a small bank *de minimis* exception.**

*Geographic Market*

The competition that community banks face is not speculative or theoretical and must be considered in the bank merger framework to promote a fair and even playing field among marketplace competitors and permit responsible mergers among community banks.

Banks and non-banks are no longer strictly bound by geographical limits, as banks with websites or phone applications can more readily offer products to customers using computers or smartphones.[18] Although most community banks do not lend nationwide, the vast majority still compete with financial institutions that do operate nationwide. [19] This operational environment is a notable contrast from the operational environment that existed when the BMA framework was put in place decades ago, when banks were heavily restricted in their ability to operate in different geographies.[20] Further, banks face competition from non-bank entities, such as fintechs, online lenders, tax-exempt credit unions, the Farm Credit System, among others. Given the scope of competition has fundamentally changed since the BMA was enacted, geographic markets are no longer the exclusive measure of competition in the marketplace.

*Need for a Rural Market Tailored Approach*

The proposal does not include a tailored approach to assessing competitive effects in rural markets. In these communities, HHI and other measures are often misleading, particularly when residents receive

[18] Remarks by FDIC Vice Chairman Travis Hill at the Cato Institute on “Insights on the FDIC’s Agenda,” September 21, 2023.
[19] *Id*.
[20] *Id.*

banking services from credit unions, the Farm Credit System, or other non-banks. Furthermore, HHI fails to address the reality that community banks are competing with both banks and non-bank entities that "reside" in other markets. The FDIC's proposal discourages mergers between smaller banks in the same rural community in favor of acquisitions by larger banks or non-bank credit unions from outside its community.[21]

Community banks operating in rural markets have 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 FDIC should consider using a higher HHI threshold in rural markets so that fewer merger applications among community banks are considered threats to competition. The fictional county approach to geographic markets favored by the Federal Reserve must be revisited. In addition, the FDIC must take into account 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.

As such, ICBA encourages a tailored approach to assessing rural market competitiveness and recommends that the FDIC provide identical treatment for loans made by farm credit associations and agricultural loans made by commercial banks. Under the current framework, lending from farm credit associations is only a "mitigating factor" in the competitive analysis even though farm credit associations are the primary competitor of community banks in rural markets. According to a study conducted by the Federal Reserve Bank of Kansas City, which evaluated competition in local agricultural markets, farm credit associations "often reduce measures of local market concentration, which implies excluding them from market structure analyses may understate the market's competitiveness."[26]

*Revised Competitive Effects Framework is a Significant Improvement*

The FDIC's proposed SOP states:

> [T]he FDIC generally employs a framework for evaluating competitive effects involving a transaction between IDIs with traditional community banking operations within their local geographic markets. However, the FDIC will tailor its evaluation to consider the size and competitive effects of the resulting IDI. Additionally, the FDIC will consider all relevant market participants. For example, the FDIC may include any other financial service providers that the FDIC views as competitive with the merging entities, including providers located outside the geographic market when it is evident that such providers materially influence the market.[22]

[21] Statement by Jonathan McKernan, Director, FDIC, Board of Directors, on the Proposed Statement of Policy on Bank Merger Transactions, March 21, 2024.
[22] 89 Fed. Reg. 29240.

In our view, this proposed language represents a significant improvement over the current SOP and ICBA is highly supportive of it being included in a final rule. The above language better enables the FDIC to evaluate the true competitive landscape that banks face, where competition comes not just from other community banks, but from credit unions, fintechs, and non-banks both within and outside of their geographic market. Specifically, because tax-exempt credit unions compete directly with banks in the market for loans and federally insured deposits, these non-banks and all market participants should be included in the agency's evaluation of market concentration.

The FDIC notes it uses deposits as an "initial proxy" for commercial banking products and services, but it will tailor the product market definition to individual products as needed, and will analyze deposit and loan activity or utilize additional analytical methods, data sources, or geographic or product market definitions in order to asses the competitive effects of a proposed transaction and whether consumers retain meaningful choices. The proposal sets forth a more wholistic approach to its competitive analysis where the HHI is not a definitive factor in making a determination in its competitive effects analysis of a transaction. ICBA is supportive of such approach to the competitive analysis of a bank's "true" marketplace.

In addition, we support the FDIC's decision to "consider concentrations in any specific products or customer segments, such as, for example, the volume of small business or residential loan originations or activities requiring specialized expertise."[23]

*Small Bank De Minimis Exception*

ICBA also recommends a small bank *de minimis* exception whereby merger transactions among small banks are subject to faster agency review timeframes and are presumed to not create monopolies or anticompetitive effects as no individual community bank holds enough nationwide market share to pose systemic risk or be considered a monopoly.

We suggest the FDIC apply this small bank *de minimis* exception to all proposed mergers where both the acquiring and acquired bank have $10 billion or less in total consolidated assets. While several community banks exceed this threshold, many regulatory conventions use a $10 billion threshold when defining a "community bank," distinguishing the risk profiles from non-community banks.[24]

While ICBA appreciates the move away from a narrow view of a bank's true competitive landscape by not solely relying on HHI, such a departure, as noted by FDIC Director, Jonathan McKernan, should not preclude the FDIC from providing clarity by adopting specific, metric-based presumptions or safe harbors for mergers that do not pose competitive effects concerns.[25] Accordingly, ICBA recommends the implementation of a small bank *de minimis* exception.

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[23] *Id.*

[24] "Over the Line: Asset Thresholds in Bank Regulation," Congressional Research Service, May 3, 2021, at 2. While the FDIC identifies community banks through a number of criteria, including the size of certain balance sheet items relative to others and geographic considerations, the OCC and FRB base their definition of "community bank" on a $10 billion asset threshold.

[25] Statement by Jonathan McKernan, Director, FDIC, Board of Directors, on the Proposed Statement of Policy on Bank Merger Transactions, March 21, 2024.

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**<u>The current approach to assessing the convenience and needs factor is not sufficiently robust – the FDIC should expand its assessment beyond deposit products in the bank's market and further specify the criteria that non-bank acquirers must satisfy in order to acquire banks.</u>**

The proposal adopts a new expectation "that a merger between IDIs will enable the resulting IDI to *better* meet the convenience and the needs of the community to be served than would occur absent the merger."[26] It is unclear whether there is any basis in law for an expectation that the post-merger entity do "better" on the convenience and needs factor.[27] Moreover, if finalized as proposed, this new requirement will harm community banks in two distinct ways. First, for mergers among community banks it creates undue burden, as it may no longer be sufficient for applicants to demonstrate how the IDIs *currently* meet such needs and *will continue to do so* after the consummation of the proposed transaction. Instead, under the proposed approach, the applicant will need to go a step further to demonstrate "an improvement" in meeting such needs. This additional step would apply even for banks who currently have outstanding CRA ratings – leaving open the question of what the FDIC would expect from banks to prove they could improve or do "better" post-merger. There is no guidance provided on the weight attached to this betterment requirement. Second, this new requirement does nothing to address those situations where CRA-exempt credit unions seek to acquire community banks, thus removing the CRA framework entirely from the local community.

To address these flaws, ICBA recommends the FDIC adopt the following recommendations in the final proposal: (1) no "betterment" requirement on community banks; (2) adopt a separate review framework for mergers involving community banks and non-bank acquirers to ensure the surviving entity can maintain existing community development lending and investments.

*Separate Review Framework is Needed for Non-Bank Acquirers*

ICBA is deeply concerned about the growing trend of tax-exempt and CRA-exempt credit unions acquiring tax-paying community banks that are subject to the CRA. Because credit unions are exempt from the CRA, the FDIC should ensure that any non-bank entity acquiring a bank is committed to serving the convenience and needs of the community 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.

Credit unions compete with community banks because "field of memberships" are pliable and no longer limit their abilities to attract customers, especially in light of their tax-exempt status. Credit union acquisitions of community banks are no longer a small concern – they are a significant part of overall bank merger activity. As of June 4, 2024, credit unions accounted for 12 of the 48 bank acquisitions announced this year. It is critical for the FDIC to clearly provide criteria that will need to be satisfied by credit unions, among other non-bank acquirers that are not subject to the same regulatory regime as banks.

The FDIC should create a dedicated credit union/non-bank-bank acquisition review framework that creates a set of procedures the agency would use to collect and scrutinize information about the acquirer's lending practices. It may also be necessary for the FDIC to require written agreements or community

[26] *Id.*
[27] *Id.*

benefits agreements in non-bank transactions in order to maintain the level of community development lending and investment by the surviving entity.

There is concern that under the current rules it is overly difficult for the FDIC – as well as other stakeholders – to evaluate whether a credit union meets the convenience and needs of its community, as required by the BMA. Credit unions are exempt from the CRA and so do not report their lending to low- and moderate- income (LMI) households, small businesses, and community development lending and investment in the same manner as banks. CRA ratings are not the only factor considered when agencies evaluate the convenience and needs factor, but are a critical part of the analysis.

Unlike community banks, credit unions generally do not have an ongoing obligation to lend in LMI census tracts or to meet the needs of small businesses. Therefore, when the FDIC and other regulators permit credit unions to acquire community banks, lending to small businesses in the bank's assessment area is likely to decrease because credit unions face legal restrictions on their small business lending.[28] Accordingly, given these limitations, credit union acquisitions of banks should be presumed to negatively impact consumers. 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.

Additionally, ICBA is 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, the NCUA conducts approximately 50 annual fair lending exams of federal credit unions, with state credit unions receiving no scrutiny. If credit unions continue to acquire community banks it is likely that this relative lack of scrutiny may lead to a greater number of undetected fair lending violations.

When a credit union proposes to acquire a bank, that bank's primary federal regulator should evaluate the credit union's retail lending to LMI borrowers and in LMI census tracts. The regulator 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 Home Mortgage Disclosure Act (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 these analyses, it is not credible for the FDIC to conclude that a credit union acquiring a bank will serve the convenience and needs of the community at the same level as the bank that it purchases, let alone *better* meet the convenience and needs of the community.

**<u>ICBA agrees with the FDIC that institutions with more than $100 billion in total consolidated assets should be subject to heightened scrutiny.</u>**

In evaluating the risk to the stability of the U.S. banking or financial system, the proposed SOP identifies the following factors: (i) the size of the entities involved in the transaction; (ii) the availability of substitute

[28] 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, such as the low-income designation, that allow credit unions to circumvent this legal limit, community banks are still the industry leaders in the small business lending market.

providers for any critical products and services to be offered by the resulting IDI; (iii) the resulting IDI's degree of interconnectedness with the U.S. banking or financial system; (iv) the extent to which the resulting IDI contributes to the U.S. banking or financial system's complexity; and (v) the extent of the resulting IDI's cross-border activities.

The FDIC notes these considerations are not exhaustive, and that it will evaluate any additional elements that may affect the risk to the U.S. banking or financial system's stability. Accordingly, the FDIC should consider other factors as well, such as the resulting IDI's regulatory framework, consideration of the merging IDI's records with respect to cybersecurity and stress-testing results, and the degree to which the resultant IDI's potential financial distress or rapid liquidation could cause other market participants with similar activities or business profits to experience a loss of market confidence, falling asset values, or decreased funding options.

The proposed SOP's new financial stability considerations relate exclusively to ways in which a merger could increase risk to financial stability but does not consider ways in which a merger could decrease risk to financial stability by, for example, fostering competition with the largest banks or improving the financial condition of a weaker bank.[29]

Rather than *predetermining* that any merger transaction above a certain asset threshold poses systemic risk, ICBA recommends the FDIC consult with the DOJ when a transaction results in an institution above $100 billion in total consolidated assets to determine whether the benefits of the merger outweigh the risk the combined institution will pose systemic risk or be "too big to fail." We believe this is a flexible, case-by-case approach that introduces an extra layer of scrutiny for large bank mergers without creating a "cliff effect" that discourages, delays or *de facto* blocks all large bank mergers above $100 billion, or that incentivizes institutions to hover in asset sizes just below $100 billion.

Additionally, the FDIC should evaluate enterprise risk management and compliance management systems of regional banking organizations above $100 billion in total consolidated assets to confirm that they can withstand the greater burden of such size and complexity. Further, FDIC's Division of Resolutions and Receiverships (DRR) should evaluate consolidation of economic power by banks with $100 billion in total consolidated assets in its evaluation of potential failed bank bidders.

## Conclusion

ICBA appreciates the FDIC's proposal to provide greater transparency into its bank merger review process. While ICBA disagrees with some of the proposed changes as discussed above, 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 receiving heightened scrutiny.

Under the current system, too much scrutiny is expended on small mergers between community banks and insufficient scrutiny is applied to mergers by very large regional, super-regional, and "Too Big to Fail" banks. This is not only a FDIC problem – and we, once again, renew our call for the federal banking regulators to create a unified interagency set of merger guidelines and policies. Any new guidelines should

[29] Statement by Jonathan McKernan, Director, FDIC, Board of Directors, on the Proposed Statement of Policy on Bank Merger Transactions, March 21, 2024.

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, and by taking a more wholistic approach to its competition analysis.

Finally, we encourage the FDIC to use this opportunity to provide for a small bank *de minimis* exception for small bank mergers creating an expedited processing for such applications given that no individual community bank holds enough nationwide market share to pose systemic risk or create a monopoly.

If you have any questions about the positions stated in this letter, please feel free to contact us at Jenna.Burke@icba.org or Michael.Emancipator@icba.org.

Sincerely,

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