American Bankers Association
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Ms. Ann E. Misback
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Ave, NW
Washington, DC 20551

Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
400 7th Street, SW
Washington, DC 20219

Re: *Thresholds Increase for the Major Assets Prohibition of the Depository Institution Management Interlocks Act Rules. (**OCC**: Docket ID OCC-201X-0011; **Federal Reserve Board**: Docket No. R-1641, RIN 7100-AF31; **FDIC**: RIN 3064-AE57)*

Dear Sir or Madam:

The American Bankers Association[1] (ABA) appreciates the opportunity to provide comments on the joint notice of proposed rulemaking issued by the Office of the Comptroller of the Currency, Federal Reserve Board of Governors, and Federal Deposit Insurance Corporation (Agencies) regarding an increase in the major assets thresholds found in the Depository Institution Management Interlock Act (DIMIA) regulations.[2] The Agencies' proposal seeks to raise the major assets thresholds for the first time since they were raised by Congress in 1996.[3] This effort fulfills a commitment made by the Agencies in their March 2017 final report[4] published pursuant to the Economic Growth and Regulatory Paperwork Reduction Act (EGRPRA) review.[5]

DIMIA seeks to foster competition between banks by generally prohibiting shared management officials between two unaffiliated depository organizations within the same "community" or "relevant metropolitan statistical area" (RMSA). Regardless of geographic overlap, DIMIA also prohibits shared management officials between two depository organizations that exceed the

[1] The American Bankers Association is the voice of the nation's $18 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard nearly $14 trillion in deposits and extend more than $10 trillion in loans.
[2] *See* Thresholds Increase for the Major Assets Prohibition of the Depository Institution Management Interlocks Act Rules, 84 Fed. Reg. 604 (proposed Jan. 31, 2019) (to be codified at 12 C.F.R. pt. 348).
[3] *See* Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub. L. 104-208, § 2210(a), 110 Stat. 3009, 3009-409 (1996).
[4] *See* FED. FIN. INSTS. EXAMINATION COUNCIL, JOINT REPORT TO CONGRESS: ECONOMIC GROWTH AND REGULATORY PAPERWORK REDUCTION ACT (2007), https://www.ffiec.gov/pdf/2017_FFIEC_EGRPRA_Joint-Report_to_Congress.pdf.
[5] *See* 12 U.S.C. § 3311 (2018) (Economic Growth and Regulatory Paperwork Reduction Act § 2222).

major assets thresholds. Unchanged since 1996, the major assets thresholds prevent a management official at a depository organization with total assets exceeding $2.5 billion from concurrent service as a management official of an unaffiliated depository organization with total assets exceeding $1.5 billion. However, depository organizations can ask the Agencies for an exemption from the major assets prohibition. The Agencies consider whether to grant an exemption based on whether there is competitive harm in permitting the interlock. ABA notes that this determination does not appear to involve an analysis based on asset size.

The Agencies' proposal seeks to set both of the major assets thresholds at $10 billion. This would mean that management officials at a depository organization with total assets exceeding $10 billion would not be able to serve at the same time as a management official at an unaffiliated depository organization with total assets exceeding $10 billion, absent regulatory approval. However, the Agencies also offer three alternative approaches to adjusting the major assets thresholds based on (1) the percentage of banks covered by the prohibition in 1996; (2) the asset growth of the banking industry since 1996; or (3) inflation since 1996.

The Agencies' Proposal Can Avoid Embracing Arbitrary Thresholds

ABA appreciates the intent of this proposal and supports an increase in the major assets thresholds, a welcome step in modernizing an outdated regulation. However, ABA cautions against the use of an arbitrary line dividing or defining community banks. In ABA's view, the Agencies' effort to provide relief under DIMIA should not rely upon or require any arbitrary definition of what identifies a particular class of bank, but rather should rest upon an evaluation of competitive concerns as embodied in the statute.[6] The purpose of DIMIA is to "foster competition by generally prohibiting a management official from serving two nonaffiliated depository organizations *in situations where the management interlock likely would have an anti-competitive effect*."[7] (emphasis added).

The Agencies state in this proposal that "having a single, consistent asset threshold (i.e. $10 billion) would simplify the [A]gencies' DIMIA regulations and enable depository organizations to identify more easily whether they may be subject to the major assets prohibition."[8] ABA notes that the validity of such an assertion will erode if the Agencies make further adjustments to this threshold to account for inflation, as they propose to do.[9]

ABA supports the Agencies' commitment to adjust the major assets thresholds and support the Agencies in any upward adjustment to account for inflation. However, ABA observes that any upward adjustment that accounts for inflation or market changes will quickly shift the major assets thresholds to something other than the "single, consistent asset threshold" (i.e. $10 billion) that this proposal highlights as a clear line for applicability. Said differently, the only way for these thresholds to remain easily identifiable at $10 billion would be for the Agencies to fall short on their commitment to revise these thresholds to account for inflation on a regular basis.

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[6] Thresholds Increase for the Major Assets Prohibition of the Depository Institution Management Interlocks Act Rules, 84 Fed. Reg. at 606.
[7] 12 C.F.R. §§ 212.1(b), 238.91(b), 26.1(b), 348.1(b) (2019).
[8] Thresholds Increase for the Major Assets Prohibition of the Depository Institution Management Interlocks Act Rules, 84 Fed. Reg. at 606.
[9] *Id.* at 607.

ABA recognizes that these arbitrary asset thresholds were originally set by Congress in 1978 and then revised by Congress in 1996. However, the statutory text empowers the Agencies to take into account inflation or market changes in revising these thresholds.[10] ABA believes that there may be better approaches than merely setting new arbitrary thresholds (albeit at more up-to-date levels). This effort to modernize DIMIA's major assets thresholds should make full use of these statutory powers to revise these thresholds to account more adequately for market changes.[11]

Consider Alternative Measures for the Thresholds for the Major Assets Prohibition

As noted above, the policy objective of DIMIA is to foster competition between banks and address anticompetitive concerns. ABA believes that threshold adjustments should be rooted more fully in the policy objectives of the relevant statute and should avoid reinforcing similar arbitrary thresholds found elsewhere. To that end, ABA believes that a better approach to change DIMIA's thresholds would be based on analysis related to competitive effect, recognizing that the market and the competitive profile of the industry has changed, and will change, over time.

One approach the Agencies should consider is an upward revision of the major assets thresholds based on a bank's share of total industry assets, which bears more directly on bank competition than other alternatives offered in the proposal. In 1996, the major assets thresholds of $1.5 billion and $2.5 billion captured banks with market shares of total industry assets of 0.027 percent and 0.045 percent, respectively.[12] Today, these unchanged thresholds capture banks with market shares of total industry assets of 0.008 percent and 0.014 percent.[13] Then and now, the major assets thresholds capture too many institutions that have a very low market share of total industry assets. ABA does not believe it is sensible to presume anticompetitive risk for institutions that have such a low market share of total industry assets.

To that point, ABA suggests that the Agencies revise the major assets prohibition thresholds to provide relief based on a modern look at the share of total industry assets. Even with a very conservative measure, where both major asset thresholds were set to extend to anyone with no more than 0.1 percent in total industry assets, the Agencies would set the thresholds at $17.9 billion. If the Agencies used 0.5 percent of total industry assets, this would place the asset thresholds at $89.7 billion.[14] As an additional benefit, by incorporating a measure based on a bank's share of total industry assets into the Agencies' regulations, the Agencies could avoid the need for continuous notice and comment rulemaking to revise this threshold.[15]

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[10] *See* 12 U.S.C. § 3203.
[11] *Id.*
[12] FDIC Statistics on Depository Institutions (SDI), https://www5.fdic.gov/sdi/main.asp?formname=customddownload. ABA considered data on total assets for Q4 1996 and calculated each bank's share of total industry assets. We then determined the share of total industry assets that aligned with the $1.5 billion and $2.5 billion thresholds.
[13] FDIC Statistics on Depository Institutions (SDI), https://www5.fdic.gov/sdi/main.asp?formname=customddownload. ABA considered data on total assets for Q4 2018 and calculated each bank's share of total industry assets. We then determined the share of total industry assets that aligned with the $1.5 billion and $2.5 billion thresholds.
[14] Source: FDIC Aggregate Time Series Data: Balance Sheet. ABA calculations.
[15] ABA suggests that the Agencies publicize this changing threshold annually, in the same manner the Agencies publicize other threshold changes. One example is the Community Reinvestment Act threshold adjustments for small and intermediate small institutions.

Further, the banking industry has also changed considerably in the past two decades, with a trend toward consolidation that shifts what can fairly be treated as a large institution. For instance, the average assets per bank was $490 million in 1996. Today, it is nearly seven times that, at $3.3 billion per bank.[16] If the Agencies used an alternative measure for the thresholds for the major assets prohibition centered on the growth in the average assets per bank from 1996 to 2018, the $1.5 billion and $2.5 billion thresholds would be raised to $10.1 billion and $16.9 billion, respectively.

Exempt Non-U.S. Affiliates from Management Interlock Requirements

In March 2016, ABA wrote a letter[17] in response to the Agencies' decennial review of their regulations mandated by EGRPRA.[18] In that letter, ABA noted that the major assets prohibition extends to non-U.S. affiliates, which gives global reach to the limits found in DIMIA. This requires depository organizations operating in countries beyond the United States to monitor potential management interlocks on a global scale, since most depository organizations with a global presence will have assets well above the major asset thresholds the Agencies set. Such a requirement exists for a depository organization's smallest affiliates, even if a shared management official's service spans different countries or continents, and even if the affiliates are not engaged in business activities in the United States.

ABA continues to believe that the Agencies should develop an exception for depository organizations' foreign affiliates that are not engaged in business or activities in the United States. DIMIA was not intended to have a global reach. Rather, DIMIA's focus is on limiting shared management officials in the same "city, town, or village" or the same "metropolitan statistical area."[19] Further reinforcing the local focus of this statute are the listed exceptions, which include Edge Act Corporations and foreign depository institutions that do not do business within the United States.[20] As evidenced by the policy objectives and geographic focus of the rules, the competitive concerns that Congress appeared most concerned about are simply not present with foreign affiliates not doing business in the United States. Accordingly, providing an express exemption for management officials of foreign affiliates would provide a benefit to impacted firms without compromising the policy objectives of DIMIA.

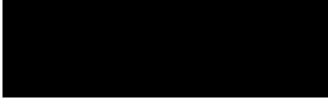
Conclusion

ABA appreciates the Agencies' effort to modernize DIMIA by increasing the major assets thresholds. However, ABA prefers an approach that would be based on an analysis more closely restinng upon the competitive issues on which the statute is based. Such an approach would also avoid any confusion that a new threshold is intended to reinforce use of an arbitrary threshold to divide or define classes of banks. Workable, more tailored alternatives that provide more relief are available. We encourage the Agencies to consider these alternatives and hope that the

[16] Source: FDIC Aggregate Time Series Data: Balance Sheet. ABA calculations.
[17] *See* Shaun Kern, *Fourth Published Request for Comments Under the Economic Growth and Regulatory Paperwork Reduction Act of 1996* 13-14 (Mar. 22, 2016), https://www.aba.com/Advocacy/commentletters/Documents/ABACommentLettertoJointAgenciesonFourthEGRPRAReview.pdf
[18] *See* 12 U.S.C. § 3311.
[19] 12 U.S.C. § 3202(1)-(2).
[20] 12 U.S.C. § 3204(2), (4).

Agencies will also consider modernizing DIMIA by exempting foreign affiliates not engaged in business in the U.S. Should you have any questions, please do not hesitate to contact the undersigned at skern@aba.com or (202) 663-5253.

Sincerely,



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