MID-SIZE BANK COALITION OF AMERICA

June 11, 2024

Via Email: Comments@fdic.gov

Federal Deposit Insurance Corporation
550 17th Street NW
Washington, DC 20429

Re: Request for Comment on Proposed Statement of Policy on Bank Merger Transactions (RIN 3064–ZA31)

Ladies and Gentlemen:

The Mid-size Bank Coalition of America (**MBCA**) appreciates the opportunity to comment on the Federal Deposit Insurance Corporation's (**FDIC**) proposed Statement of Policy on Bank Merger Transactions (**FDIC Proposal**).[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 FDIC Proposal and the Office of the Comptroller of the Currency's notice of proposed rulemaking regarding business combinations (**OCC Proposal**)[2] are 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 that appear biased against larger transactions—potentially chilling healthy mergers. We urge the FDIC to consider the recommendations in this letter, as well as those included in our comment letter on the OCC Proposal (**OCC Comment Letter**) submitted earlier this year.[3]

[1] "Request for Comment on Proposed Statement of Policy on Bank Merger Transactions," 89 Fed. Reg. 29,222 (Apr. 19, 2024).

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

[3] MBCA, Comment Letter Re: Business Combinations under the Bank Merger Act (Docket ID OCC–2023–0017) (Apr. 15, 2024), *available at* https://www.regulations.gov/comment/OCC-2023-0017-0018.

Inconsistencies between the FDIC Proposal and the OCC Proposal show that the agencies have failed to develop a cohesive, coordinated approach to bank merger policy. Without interagency coordination and consistency, merging parties may be increasingly focused on choices of acquisition structures and bank charters instead of procompetitive effects, increasing and improving product and service offerings, and other benefits to local communities. To provide for a more rational process and outcomes, we urge the FDIC and other agencies to take a coordinated approach as they seek to modernize the bank merger regulatory framework.

Mid-size banks today are faced with acute economic and regulatory pressures, including higher funding costs and growing competition from digital and larger banks. Bank combinations, particularly among mid-size banks, enable companies to uncover new opportunities, increase their customer base, expand into new markets, add talent, upgrade technology, and broaden their commitment to the communities they serve. Regulators should recognize that mergers are an integral part of the business cycle, and inherent in the industrial logic of today's banking sector. Our members need the ability to grow, achieve scale, add talent and leverage operational efficiencies wherever possible in order to effectively compete. The FDIC Proposal could place further strain on the competitiveness of mid-size banks by deterring beneficial business combinations. The impact would be contrary to important policy objectives of avoiding putting smaller banks at a competitive disadvantage and shielding the U.S. GSIBs from competition, as expressed by regulators in recent years.[4]

Specifically, the FDIC Proposal is likely to deter these beneficial transactions by introducing significant confusion and uncertainty around the review process. We note that very similar points have been made in a joint comment letter by former FDIC Chair Sheila Bair and former FDIC director Thomas Hoenig. We hope that the FDIC will find it very significant that two leading former principals, who are often critical of the banking sector, are making points very similar to those of the MBCA.[5] To achieve a more sustainable approach, the MBCA has six recommendations.

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[4] *See*, *e.g.*, "Statement by Travis Hill, Vice Chairman, FDIC, on the Proposal to Revise the Regulatory Capital Requirements for Large Banks" (July 27, 2023), stating "It is further a troubling sign for future policymaking, a signal that regulators intend to treat all large banks alike, in defiance of Congressional directives and in contradiction to *the objective of a diverse banking sector with banks of varying sizes, niches, and business models*." (emphasis added); "Remarks by Jonathan McKernan, Director, FDIC Board of Directors, at the New York State Bar Association and Mayer Brown on the Basel Endgame and Long-Term Debt Proposals" (Oct. 4, 2023), stating "This would be particularly a problem to the extent it has the *unintended consequence of shielding the U.S. GSIBs from competition with our regional banks*." (emphasis added). OCC Comptroller and FDIC Board Member Michael J. Hsu stated, immediately prior to the release of the OCC Proposal, 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." (emphasis added). "What Should the U.S. Banking System Look Like? Diverse, Dynamic, and Balanced," University of Michigan School of Business (Jan. 29, 2024).

[5] Sheila Bair and Thomas Hoenig, Comment on Proposed Statement of Policy on Bank Merger Transactions (June 7, 2024), *available at* https://www.fdic.gov/resources/regulations/federal-register-publications/2024/2024-proposed-policy-on-bank-merger-transactions-3064-za31-c-004.pdf.

- First, we urge the FDIC to harmonize its approach with the OCC and the Federal Reserve (**Federal Reserve**) and publish a single Interagency Policy Statement in order to maintain interagency consistency in reviewing bank mergers.

- Second, the FDIC should remove, or articulate with greater clarity, ambiguous statements and also should not adopt policies that add unnecessary complexity and uncertainty to the application review process.

- Third, the proposal should confirm that the FDIC does not apply different standards to transactions above or below $100 billion.

- Fourth, the agency should not adopt policies that stray beyond its statutory authority under the Bank Merger Act (**BMA**).

- Fifth, the FDIC should consider whether the proposed policy for evaluating the resulting institution's financial condition has unintended consequences, and, at the very least, clarify its expectations on this factor.

- Sixth, supporting materials created by or for officers, directors, or deal team leads should not be required to be submitted by applicants.

Each of these points is discussed in more detail below.

The regulators should adopt a harmonized approach to evaluating bank mergers

In July 2021, President Biden issued an Executive Order directing the Attorney General, in consultation with the heads of the Federal Reserve, the FDIC, and the OCC, to adopt a plan for the revitalization of merger oversight under the BMA and the Bank Holding Company Act (**BHC Act**).[6] Although the preamble to the FDIC Proposal states that the FDIC continues to coordinate with the Department of Justice (**DOJ**) and the other Federal banking agencies in modernizing bank merger oversight, the approach taken by the agencies to review their regulatory frameworks has been fragmented.[7] Importantly, despite some prior comments urging interagency consistency in bank merger review

[6] E.O. 14036 ‘‘Promoting Competition in the American Economy’’ (July 9, 2021).

[7] In December 2021, the FDIC made public a request for information and comment (**RFI**) that appeared to contemplate an interagency approach to modernizing bank merger reviews. "Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions," 87 Fed. Reg. 18,740 (Mar. 31, 2022). At the time, OCC Comptroller and FDIC Board member Michael J. Hsu issued a statement supporting the RFI. "Acting Comptroller Issues Statement on RFI on Bank Mergers" (Dec. 14, 2021). In a speech in June 2023, Assistant Attorney General Jonathan Kanter said that the DOJ would be reassessing the prevailing approach to bank merger enforcement. "Merger Enforcement Sixty Years After Philadelphia National Bank" (June 20, 2023). To date, the Federal Reserve has been silent on whether it will be proposing any guidelines and the DOJ has not issued any new or revised guidelines specific to bank mergers.

policy, the FDIC Proposal appears to diverge from the OCC Proposal in many respects, discussed below.

We encourage the agencies to adopt a harmonized, interagency policy statement. Without an interagency agreement, parties trying to gauge the regulatory risk of approval for their transactions face considerable uncertainty and are likely to be discouraged from seeking out beneficial combinations. In the absence of a consistent policy, parties are also likely to prioritize choices of acquisition structures and bank charters instead of procompetitive effects, increasing and improving product and service offerings, and other benefits to local communities. As articulated in recent statements by FDIC Chairman Martin J. Gruenberg, we are supportive of efforts to make the FDIC's policies related to the evaluation of bank merger applications "*more* principles based" —however, we believe that the FDIC Proposal does not go far enough to reach the intended effect of a holistic approach and remains prescriptive and rigid in its implementation.[8]

In summary, we believe that a fragmented regulatory framework places too high of a cost on merging parties and distorts behavior and incentives. We strongly urge the agencies to pursue a coordinated approach to bank merger policy.

The FDIC should not adopt standards that add unnecessary complexity and uncertainty to the application review process

In the accompanying press release, FDIC Chairman Martin J. Gruenberg stated that the FDIC Proposal "is principles based" and "would update, strengthen, and clarify the FDIC's approach to evaluating mergers under the Bank Merger Act."[9]

However, even though transparency is part of the articulated justification, the FDIC Proposal includes a number of ambiguous statements that can be easily misinterpreted, adding unnecessary complexity and uncertainty to the process. We recommend moving away from these types of statements, described in the following bullets, and adopting clearer standards that discuss explicitly the agency's posture towards these issues.

- The FDIC Proposal states that "*Generally*, if all statutory factors are favorably resolved, and all other regulatory requirements are satisfied, the FDIC will approve the merger transaction."[10] We believe the FDIC should make clear that it intends to act promptly on all applications.[11]

[8] "Remarks by Martin J. Gruenberg, Chairman, Federal Deposit Insurance Corporation on 'Oversight of Prudential Regulators' before the Committee on Financial Services, United States House of Representatives" (May 15, 2024) (emphasis added).

[9] "FDIC Seeks Public Comment on Proposed Revisions to its Statement of Policy on Bank Merger Transactions" (Mar. 21, 2024).

[10] 89 Fed. Reg. 29,226 (Apr. 19, 2024) (emphasis added).

[11] By contrast, the OCC Proposal states "The OCC aims to act promptly on all applications." 89 Fed. Reg. 10,016 (Feb. 13, 2024).

- The FDIC Proposal states that "*Generally*, the FDIC will not approve a merger application if adverse CRA comments have not been resolved" and that "the FDIC may not be able to find favorably on any given statutory factor (and the application as a whole) if there are unresolved deficiencies, issues, or concerns (including with respect to *any* public comments)."[12] As we described in detail in our OCC Comment Letter, our view is that, without a specified standard for materiality, such statements could invite a flood of frivolous complaints or concerns to delay actions, particularly for high-profile proposals. The MBCA encourages the FDIC to qualify this language and clarify that only public comments that meet a level of significance would lead to additional FDIC review.

- The FDIC Proposal states that the agency "may consider concentrations in *any* specific products or customer segments" in assessing competitive effects and that "the analysis *may* incorporate other products offered by the merging entities with consideration given to whether consumers retain meaningful choices."[13] The MBCA believes that the FDIC should provide explicit guidance on the types of concentrations (beyond deposit concentration) that will be considered and the metrics that will be used. In the absence of such parameters, applicants could be faced with an indefinite review period as the agency's policy requires them to provide ever more information.

- The FDIC Proposal states that, in assessing the managerial resources factor, the FDIC will consider the "breadth and depth of management," the "responsiveness to issues or supervisory recommendations raised by regulators or auditors," and the "existing or pending formal or informal enforcement actions."[14] The MBCA believes that these statements should be revised to make transparent the standards the FDIC will apply in its determinations and to clarify that it is not the agency's policy to apply hair-line triggers. As we discussed in our OCC Comment Letter, we believe the agencies should take the view 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 same approach should be applied when evaluating the record of each institution in complying with consumer protection requirements. The FDIC Proposal states that the "review will include consideration of *any* existing orders, ongoing enforcement actions, and *pending reviews or investigations* of violations of consumer protection laws and regulations."[15] Similar to the concerns cited above and in our OCC Comment Letter, we do not believe that the agency should use pending reviews or investigations concerning

[12] 89 Fed. Reg. 29,239-40 (Apr. 19, 2024) (emphasis added).

[13] 89 Fed. Reg. 29,240 (Apr. 19, 2024) (emphasis added).

[14] 89 Fed. Reg. 29,230 (Apr. 19, 2024).

[15] 89 Fed. Reg. 29,230-31 (Apr. 19, 2024) (emphasis added).

consumer compliance as the basis for denial of a merger application before any finding of a violation or issue has been made.[16] Furthermore, we believe the statement should make clear that the review also takes into consideration other aspects of the agency's policy on the application process. Specifically, the FDIC Proposal states that "In conjunction with the integration, the FDIC expects a resulting IDI to have the managerial and operational capacity, and to devote adequate resources, to ensure full and timely compliance with any *outstanding corrective programs or supervisory recommendations*."[17] The policy statement should make clear that any outstanding compliance issues at the target would not bar approval of the application if the acquirer is able to remedy and mitigate the identified weaknesses through integration.

The MBCA also believes the FDIC should not adopt the policies described in the following bullets without consideration of their implications and consequences, particularly in terms of the operational and reputation risks they could impose on merging parties:

- The FDIC Proposal states that the FDIC will generally hold a public hearing for applications resulting in an institution with greater than $50 billion in assets or for which a significant number of Community Reinvestment Act (**CRA**) protests are received.[18] The FDIC should acknowledge that the current merger approval process already provides for an opportunity for a written response from the applicant to both the FDIC and the commenter for any "CRA protest."[19] Rather than adopting the proposed new public process, the FDIC should continue its existing procedure, which allows for a positive and collaborative information exchange between the applicant and the commenter. In addition, current CRA regulations already provide for full transparency into the bank's performance in helping meet community credit needs. Specifically, all written comments received from the public for the current year and each of the prior two calendar years, along with any response to the comments by the bank, are required to be maintained in the bank's public file and are

[16] We believe clarification of this point is important in light of statements by FDIC Board member and CFPB Director Rohit Chopra that "the agency will carefully evaluate the *banks'* compliance records, especially with respect to *consumer law*. The agency will consult with the relevant state and federal authorities, including the CFPB. Repeat offenders of consumer protection and fair dealing laws will face a steep climb to satisfy this factor." (emphasis added). "Prepared Remarks of CFPB Director Rohit Chopra at the Peterson Institute for International Economics Event on Revitalizing Bank Merger Review" (Mar. 21, 2024). We believe this statement has had the effect of signaling to the market that there will be a change from current practices in how and which agencies review bank merger applications.

[17] 89 Fed. Reg. 29,242 (Apr. 19, 2024) (emphasis added).

[18] The FDIC Proposal also does not explain why this asset threshold should warrant a public hearing or define the term "significant" with respect to the number of CRA protests.

[19] 12 CFR 303.2(l) (defining "CRA protest" to mean any adverse comment from the public related to a pending filing which raises a negative issue relative to the CRA, whether or not it is labeled a protest and whether or not a hearing is requested); FDIC Applications Procedures Manual, Section 1.9.

available for public review.[20] In light of the existing robust process and CRA regulations, there is not a need for a presumption of a public hearing, which could create counterproductive incentives that lessen, rather than strengthen, dialogue between members of the public and an applicant. The question of whether a public hearing is appropriate should continue to be a case-by-base determination.

- The FDIC Proposal provides that the FDIC Board of Directors may make public its concerns regarding applications that are withdrawn. We believe that this policy could unfairly damage the reputation and credibility of the withdrawing banks and should not be adopted. Importantly, making withdrawals public could create unwarranted negative perceptions regarding a withdrawing party's financial health and stability among customers, investors, and the public. This could lead to unnecessary panic and loss of confidence, potentially harming the banks' business operations and market standing. Moreover, we believe this policy defeats the purpose of allowing banks to withdraw applications in the first place (as opposed to waiting for a decision).[21] This proposed process would not be necessary in the first instance if the FDIC's merger policy standards were clear and specific in the areas we highlight above, because then additional transparency through public withdrawals would not be needed.

- In evaluating the convenience and needs factor, the FDIC Proposal would require the applicants to provide specific forward-looking information. Any claims or commitments made by applicants in providing this information may be included in The Order and Basis for Approval and posted on the FDIC's website. This approach should not be adopted because it is overly rigid and would limit flexibility to respond to changing economic circumstances and market conditions.

- The FDIC should not adopt the policy that it "will not use conditions as a means for favorably resolving any statutory factors that otherwise present material concerns."[22] The MBCA believes that there are idiosyncratic factors that merit a case-by-case use of conditions in certain circumstances. We recommend a policy that is aligned with the approach expressed by OCC Comptroller and FDIC Board member Michael J. Hsu, who stated his view that, "in some instances targeted conditions can

[20] 12 CFR 345.43(a)(1).

[21] We share the views expressed by FDIC Vice Chairman Travis Hill, stating that he "appreciate[s] the desire to provide more transparency to the public regarding why certain mergers do not get approved, but believe any efforts to do so should avoid imposing reputational damage on applicants." "Statement by Vice Chairman Travis Hill on the FDIC's Proposed Statement of Policy on Bank Merger Transactions" (Mar. 21, 2024).

[22] 89 Fed. Reg. 29,239 (Apr. 19, 2024).

mitigate specific risks from a proposed merger transaction. These should be considered when they will be effective and where appropriate."[23]

- The FDIC Proposal would provide for the agency to require divestiture of business lines and branches to mitigate competitive concerns before allowing a merger to be consummated. Our members' experience is that premature disclosure of divestiture plans limits the negotiating leverage of the parties, potentially resulting in less favorable terms for the divestiture transactions and limiting the ability of the merging banks to maximize shareholder value and to achieve intended synergies and efficiencies. The FDIC's general posture that divestitures may be required as a condition to closing also adds substantial risk of employee and customer attrition following the public announcement of the transaction. These risks are further amplified because requiring divestitures will likely extend the time to closure following the initial public announcement.

Any final guidelines should clarify that the agency does not apply different standards to transactions above and below $100 billion

We recommend more clarity on the FDIC's posture towards transactions resulting in an institution above and below $100 billion.[24] Rather than stating that even though size alone is not dispositive, a resulting institution with $100 billion or more in assets is more likely to present potential financial stability concerns, the FDIC policy should make clear that size alone will not result in presumptive denial of an application. The FDIC must consider the wide range of factors it identifies in the proposal: size, substitute providers, interconnectedness, complexity, and cross-border activities. Emphasizing that size is only one of the factors considered would be consistent with the approach in the OCC Proposal, which also identifies size as one of the factors for consideration, and consistent with the statutory mandate of the BMA (discussed below). Importantly, we believe that not all banks with greater than $100 billion in total assets create greater risk on the basis of all—or even any—of these factors.

In addition, the FDIC Proposal already indicates that an enhanced resolution plan strategy may be a relatively more important factor for larger transactions given its view that "regardless of the strategy selected, the challenges associated with resolving a large

[23] "Acting Comptroller Issues Statement on the FDIC's Proposed Statement of Policy on Bank Merger Transactions," OCC News Release 2024-31 (Mar. 21, 2024).

[24] In the preamble to the FDIC Proposal, it states "the FDIC believes that the asset size of a resulting IDI should not serve as the sole basis for evaluating this statutory factor [financial stability]. Rather, size is only one of several important considerations that need to be evaluated in the context of other criteria" and in proposed policy statement it states "Generally, the FDIC will not view the size of the entities involved in a proposed merger transaction as a sole basis for determining the risk to the U.S. banking or financial system's stability." In both places, the statement then immediately includes the sentence "However, transactions that result in a large IDI (e.g., in excess of $100 billion) are more likely to present potential financial stability concerns with respect to substitute providers, interconnectedness, complexity, and cross border activities, and will be subject to added scrutiny." 89 Fed. Reg. 29,232, 29,243 (Apr. 19, 2024).

bank would be significant, both operationally and financially" and could preclude a favorable finding on financial stability.[25] These resolution planning enhancements, along with a well thought out integration plan, could mitigate any risks associated with size.

In summary, we urge the FDIC to clarify that it does not apply different standards to transactions above and below $100 billion because statements from FDIC Board members signal to the public that the agency plans to interpret "subject to added scrutiny" as presumptive denial of combinations that exceed this threshold. In his public statement published concurrently with the FDIC Proposal, FDIC Chairman Martin J. Gruenberg stated "The bank failures of 2023 underscore the risks that banks with assets over $100 billion can have for financial stability."[26] Further, FDIC Board member and CFPB Director Rohit Chopra stated in his subsequently released prepared remarks that "By codifying this threshold, boards and management at large firms can understand that the likelihood of approval of megamergers will be low."[27] As we discuss throughout this letter, such policies and statements could have a chilling effect on healthy mergers, unless the record is clarified.

The agency should not adopt policies that stray beyond its statutory authority under the Bank Merger Act

Our members are concerned that the agency may have exceeded its authority under the BMA with respect to several policies articulated in the FDIC Proposal and recommend for the following policies to not be adopted:

- In assessing the convenience and needs factor, the FDIC Proposal states that "The FDIC expects 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."[28] This policy would go well beyond the statutory factor as articulated in the BMA—specifically, that the FDIC must "*take into consideration* ... the convenience and needs of the community to be served."[29]

- The FDIC Proposal also states that the FDIC will closely evaluate any information regarding "any job losses or lost job opportunities from branching changes" in assessing the effects on the convenience and needs of the community to be served.[30] As we described in our OCC Comment Letter, this sets critical new ground on a policy without legal basis and would grant FDIC extensive discretion to engage in industrial and social

[25] 89 Fed. Reg. 29,233 (Apr. 19, 2024).

[26] "Statement by Martin J. Gruenberg, Chairman, FDIC, on Proposed Statement of Policy on Bank Merger Transactions" (Mar. 21, 2024).

[27] "Prepared Remarks of CFPB Director Rohit Chopra at the Peterson Institute for International Economics Event on Revitalizing Bank Merger Review" (Mar. 21, 2024).

[28] 89 Fed. Reg. 29,242 (Apr. 19, 2024) (emphasis in the original).

[29] 12 U.S.C. § 1828(c)(5) (emphasis added).

[30] 89 Fed. Reg. 29,242 (Apr. 19, 2024).

policy design.[31] Our members of course support consideration of the impact of a transaction 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 the FDIC, particularly when that figure is taken in isolation and, in practicality, is beyond a regulator's expertise. The FDIC's policies should focus on the statutorily articulated factors in the BMA.

- The FDIC Proposal also states that "the FDIC will generally require that the selling institution will not enter into non-compete agreements with any employee of the divested entity nor enforce any existing non-compete agreements with any of these entities."[32] Our members concur with the view expressed by FDIC Vice Chairman Travis Hill in his accompanying public statement that prohibiting non-compete agreements with the employees of a divested entity is a policy outside the FDIC's jurisdiction and expertise.[33] Moreover, we submit that the enforceability of non-compete agreements is a matter of state contract law; if contrary to state law, this policy would appear to be an attempt at preemption.

The FDIC should clarify its expectations with respect to the financial condition of the resulting institution

With respect to the financial resources factor, the FDIC Proposal states "*Generally*, the FDIC will not find favorably on the financial resources factor if the merger would result in a weaker IDI from an overall financial perspective."[34] We urge the FDIC to carefully consider any unintended consequences that could result from this policy. Many smaller banks seek out transactions with stronger acquirers. The posture that such transactions could be presumptively denied on the basis that the resulting institution would be "weaker" would discourage transactions that could prevent failures, for example, by improving the balance sheets and diversifying risks of the weaker institution. The standard also does not consider the ability and past performance of the stronger institution in successfully integrating weaker banks into its operations.

Moreover, we wish to highlight that given the impact of purchase accounting principles, which may result in reduced values of loans or other assets or increased

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[31] Our view is supported by the statement by FDIC Board member Jonathan McKernan released concurrently with the FDIC Proposal "It is also unclear to me that we legally may consider 'any job losses or lost job opportunities from branching changes.'" "Statement by Jonathan McKernan, Director, FDIC, Board of Directors, on the Proposed Statement of Policy on Bank Merger Transactions" (Mar. 21, 2024). Similarly, FDIC Vice Chair Travis Hill stated "I am skeptical that it is the FDIC's role to closely evaluate whom the resulting entity chooses to employ." "Statement by Vice Chairman Travis Hill on the FDIC's Proposed Statement of Policy on Bank Merger Transactions" (Mar. 21, 2024).

[32] 89 Fed. Reg. 29,241 (Apr. 19, 2024).

[33] "Statement by Vice Chairman Travis Hill on the FDIC's Proposed Statement of Policy on Bank Merger Transactions" (Mar. 21, 2024).

[34] 89 Fed. Reg. 29,241 (Apr. 19, 2024) (emphasis added).

expected credit losses, virtually all resulting institutions could be viewed as a "weaker" IDI from a financial perspective for a period of time. We recommend that the FDIC, at the very least, should clarify that changes in metrics that are purely the result of accounting principles would not count against applicants.

The FDIC should not require submission of supporting materials created by or for officers, directors, or deal team leads

The FDIC Proposal and proposed changes to the FDIC Supplement to the Interagency Bank Merger Act Application Form indicate that the agency expects applicants to submit studies, surveys, analyses, and reports, including those prepared by or for officers, directors, or deal team leads. This would appear to include any analyses prepared by outside consultants or investment bankers. Our members submit that mandating disclosure of such proprietary or internal analyses, which are typically prepared prior to any acquisition decision, and are based on limited information learned during due diligence, could substantially and artificially limit the usefulness and candor of such analyses, and could thereby reduce the likelihood of candid appraisals, particularly where there are negative as well as positive factors highlighted and reviewed (as is nearly always the case) in connection with the proposed transaction.

In summary, we believe that making these analyses and decision factors public could create reputation risk for applicants and limit their ability to garner candid, unvarnished views from their advisers. We recommend for the FDIC to not adopt this policy.

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 FDIC Proposal, however, would be an impediment to that consolidation, as it introduces significant uncertainty about how merger proposals will be reviewed. In particular, we believe the FDIC Proposal would adopt a number of new policies that should not bear on the FDIC's review, including some policies that appear to stray from its statutory authority under the BMA. We agree with Former Chair Bair and Former Vice Chair Hoenig that preventing mid-size banks from seeking scale by combination would unfairly shield the largest incumbents from competition and further exacerbate a two-tier banking system.[35] Depositors would be worse for it. We encourage the FDIC to consider the points in this letter and our OCC Comment Letter before finalizing the FDIC Proposal.

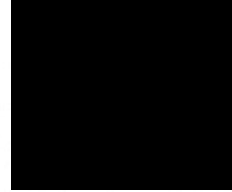
Finally, the MBCA is very concerned with the inconsistencies between the FDIC Proposal and the OCC Proposal. To provide for a more rational process and outcomes,

[35] Sheila Bair and Thomas Hoenig, Comment on Proposed Statement of Policy on Bank Merger Transactions (June 7, 2024), *available at* https://www.fdic.gov/resources/regulations/federal-register-publications/2024/2024-proposed-policy-on-bank-merger-transactions-3064-za31-c-004.pdf.

we urge the FDIC and other agencies to take a coordinated approach as they modernize the bank merger regulatory framework. 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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