

# The Banking Law Journal

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# Office of the Comptroller of the Currency Proposes Changes to Merger Review Process

*By Grant F. Butler, Robert M. Tammero, Jr, Yuki Sako and  
Aiden D. O’Leary\**

*In this article, the authors review a notice of proposed rulemaking issued by the Office of the Comptroller of the Currency regarding its review of Bank Merger Act applications.*

The Office of the Comptroller of the Currency (OCC) has issued a notice of proposed rulemaking (NPR) regarding its review of Bank Merger Act (BMA)<sup>1</sup> applications.<sup>2</sup> The NPR was released immediately following a speech by Acting Comptroller of the Currency Michael Hsu in which he commented on the U.S. banking system, including actions the OCC is taking to improve transparency and trust in the OCC’s review and approval process for proposed bank mergers. The NPR consists of two proposals:

- Regulatory changes to the OCC’s bank merger review procedures, and
- A new policy statement (Proposed Policy Statement) that summarizes the principal factors that the OCC would consider in reviewing proposed mergers under the BMA.

## **RECENT ACTIONS REGARDING BANK MERGER REVIEW PROCESS**

The NPR is one of the latest government and agency actions over the last few years that signal changes to the regulatory review and approval process for bank mergers. In 2021, President Biden issued an executive order that encouraged the U.S. Attorney General, in consultation with the heads of the respective federal bank regulatory agencies (collectively, the Agencies), to review their practices and adopt a plan “for the revitalization of merger oversight.” However, the NPR is limited to proposed mergers for which the OCC is the reviewing Agency.<sup>3</sup>

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<sup>1</sup> 12 U.S.C. § 1828(c).

<sup>2</sup> Office of the Comptroller of Currency, Treasury, “Business Combinations under the Bank Merger Act,” 89 Fed. Reg. 10010 (February 13, 2024).

<sup>3</sup> Subsequent to the NPR, on March 21, 2024, the Federal Deposit Insurance Corporation (FDIC) proposed revisions to its statement of policy on bank merger transactions (FDIC Proposal). Federal Deposit Insurance Corporation, “Request for Comment on Proposed Statement of Policy on Bank Merger Transactions,” 89 Fed. Reg. 29222 (April 19, 2024). This

In December 2023, the U.S. Department of Justice Antitrust Division (the DOJ) and the Federal Trade Commission jointly issued new guidelines covering antitrust review of proposed mergers, which apply across industries. They contain lower (i.e., less permissive) quantitative thresholds than had previously been applied to determine whether a proposed bank merger may run afoul of federal antitrust laws. In his January 29, 2024, speech, Acting Comptroller Hsu reported that the Agencies are collaborating with the DOJ on an updated framework for reviewing proposed bank mergers under the competition prong of the BMA.<sup>4</sup> The Agencies have indicated that they are reconsidering deposit market share as the sole measure for banking market concentration and assessing whether other measures may better capture competition from thrifts, credit unions and non-bank financial service providers.

### PROPOSED REGULATORY CHANGES

The NPR proposed removal of the 15-day expedited review and streamlined application processes from Part 5 of the OCC's regulations.

Currently, expedited review is available for internal business reorganizations<sup>5</sup> or transactions involving qualifying well-capitalized and highly-rated "eligible institutions,"<sup>6</sup> and these qualifying transactions are deemed approved as of the 15th day after the close of the public comment period unless the OCC intervenes.<sup>7</sup> In the NPR, the OCC expressed an apparently new view that any business combination requiring a filing with the OCC is a significant corporate transaction requiring an OCC decision, which should not be deemed approved based solely on passage of time.

The OCC also proposes to eliminate "streamlined applications" which generally require less information compared to the standard BMA Application.<sup>8</sup> While the NPR suggests that the OCC may require less information for a purchase and assumption transaction from an institution in FDIC receivership or for a transaction involving a failed bank,<sup>9</sup> there is no indication that the OCC would otherwise accept abbreviated application information for bank merger transactions, including internal business reorganizations.

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article does not intend to provide detailed analysis of the FDIC Proposal.

<sup>4</sup> The current framework, "Bank Merger Competitive Review – Introduction and Overview" was last updated in 1995.

<sup>5</sup> 12 CFR 5.33(d)(3).

<sup>6</sup> 12 CFR 5.33(j)(1).

<sup>7</sup> 12 CFR 5.33(i).

<sup>8</sup> 12 CFR 5.33(j)(3).

<sup>9</sup> NPR at 8.

The result of these proposed changes would be to subject transactions that may not present much regulatory risk to more regulatory scrutiny.

**PROPOSED POLICY STATEMENT**

The Proposed Policy Statement sets forth principles the OCC would use in evaluating BMA applications and expands on how the OCC would consider three of the five statutory factors the BMA requires the OCC to consider in reviewing a bank merger application:

- (1) Financial stability;
- (2) Financial and managerial resources and future prospects; and
- (3) Convenience and needs of the community.

**General Principles of OCC Bank Merger Review**

The Proposed Policy Statement includes general principles that would guide the OCC’s review of a bank merger application. As indicated in Figure 1, it sets forth 13 indicators of applications that would likely be approved, and six indicators of applications that would likely be denied or requested to withdraw.

**Figure 1**

Indicators of Applications Likely Approved (All Indicators Must Be Satisfied)	Indicators of Applications Not Likely Approved (Any Indicator May Be Sufficient)
<ul style="list-style-type: none"> <li>1. The acquirer and the resulting institution are both well capitalized;</li> <li>2. The resulting institution will have total assets less than \$50 billion;</li> <li>3. The acquirer has a CRA rating of “Outstanding” or “Satisfactory”;</li> <li>4. The acquirer has a composite CAM-ELS rating of 1 or 2;</li> <li>5. The acquirer has a consumer compliance rating of 1 or 2;</li> <li>6. The acquirer has no open enforcement actions;</li> <li>7. The acquirer has no open fair lending actions;</li> <li>8. The acquirer is effective in combating money laundering activities;</li> <li>9. The target’s total combined assets are less than or equal to 50% of acquirer’s total assets;</li> <li>10. The target is an “eligible” depository institution;</li> </ul>	<ul style="list-style-type: none"> <li>1. The acquirer has a CRA rating of “Needs to Improve” or “Substantial Noncompliance”;</li> <li>2. The acquirer has a consumer compliance rating of 3 or worse;</li> <li>3. The acquirer has a composite CAM-ELS rating of 3 or worse or the most recent exam otherwise indicates that the acquirer is not financially sound or well managed;</li> <li>4. The acquirer is a global systemically important banking organization (G-SIBs), or subsidiary thereof;</li> <li>5. The acquirer has open Bank Secrecy Act/Anti-money Laundering enforcement or fair lending actions; or</li> <li>6. The acquirer failed to adopt all the corrective actions required by an enforcement action in a timely manner; or there are multiple enforcement actions against the acquirer during a three-year period.</li> </ul>



<p>11. The proposed transaction clearly would not have a significant adverse effect on competition;</p> <p>12. The OCC has not identified a significant legal or policy issue; and</p> <p>13. No adverse comment has raised a significant CRA or consumer compliance concern.</p>	
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### **Assessing Financial Stability**

The Proposed Policy Statement provides more context surrounding the balancing test used for assessing the effects a proposed merger would have on financial stability. Under the Proposed Policy Statement, the OCC would evaluate a number of factors which are viewed both individually and in combination, and in some circumstances, a single factor could be sufficient to deem a transaction too risky for approval.<sup>10</sup> The OCC may also approve certain applications where risk factors are present, “subject to conditions that are enforceable under 12 U.S.C. 1818,”<sup>11</sup> which permits the OCC to mandate the divestiture of certain assets or increased capital requirements.

### **Financial and Managerial Resources and Future Prospects**

The Proposed Policy Statement indicates that the OCC would review financial and managerial resources and future prospects independently for each of the institutions involved in a proposed merger, as well as for the resulting institution.<sup>12</sup> It sets forth the following characteristics of an acquirer for which the OCC is less likely to approve a proposed merger:

- (1) Has an unsatisfactory supervisory record;
- (2) Has experienced rapid growth;
- (3) Has engaged in multiple acquisitions with overlapping integration periods;
- (4) Has failed to comply with past OCC licensing decisions; or
- (5) Is functionally the target of the acquisition.

The OCC will generally deny any transactions that result in an institution with “less than adequate capital, less than satisfactory management, or poor

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<sup>10</sup> NPR at 11.

<sup>11</sup> NPR at 12.

<sup>12</sup> 12 U.S.C. 1828(e)(5).

earnings prospects.”<sup>13</sup> Additionally, in its review, the OCC will consider whether the transaction would impact credit, interest rate, liquidity, price, operational, compliance, strategic, and reputation risks.<sup>14</sup> The OCC expects acquirers to conduct all relevant due diligence, and will take into consideration whether the planned implementation of controls are adequately designed based on the target institution’s business model and risk profile. The Proposed Policy Statement especially emphasizes the inclusion of a detailed integration plan for business continuity.

### **Convenience and Needs of the Community**

The Proposed Policy Statement also discusses the OCC’s evaluation of the effect a proposed transaction would have on the needs of the communities involved, including whether the proposed merger would result in the closure or opening of any branches, and its impact on access to credit and particular financial products and services, jobs, and any community investments involved. The OCC’s review would take special notice of how these mergers affect low and moderate-income communities, which will be done separate and apart from the consideration of the institutions’ CRA record of performance.

### **OBSERVATIONS**

Acting Comptroller Hsu stated that the Proposed Policy Statement is intended to remove uncertainty, but not to create a legal presumption for or against the approval of any specific merger transaction. However, the Proposed Policy Statement, if adopted as proposed, could have a chilling effect on an already constrained bank merger market. The average approval times for bank merger applications have been steadily increasing over the past few years, and the NPR excludes any consideration of increased resources for the application reviewing teams. Removing expedited treatment for applications that meet high prudential standards would only exacerbate this trend.

### **Size Matters**

The Proposed Policy Statement sets forth two notable factors relating to the size of the combining institutions.

First, it indicates that the OCC would generally not approve a transaction in which the resulting institution would have total assets of \$50 billion or greater. This appears to be a potential bar on acquisitions by regional institutions. However, the factors that the OCC stated would raise supervisory or regulatory

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<sup>13</sup> NPR at 14.

<sup>14</sup> See Comptroller’s Handbook, “Bank Supervision Process” at 26-28 (Version 1.1, September 2019).

concerns include that the acquirer is a G-SIB, which raises the question of how the OCC would approach merger transactions of institutions that have more than \$50 billion in assets but are not G-SIBs.

Second, the Proposed Policy Statement indicates that the target institution should have total assets that are less than or equal to 50% of the acquirer's total assets. This consideration of relative size is currently a requirement for certain transactions to qualify for expedited review and streamlined applications. Restating such requirement as a factor that generally would be consistent with approval implies that the OCC would not look favorably on "mergers of equals" or transactions amongst similarly sized institutions regardless of the overall size or complexity of the institution, which could be very impactful to community bank mergers.

### **Uneven Playing Field**

As noted above, the FDIC followed the OCC and issued the FDIC Proposal relating to its statement of policy on bank merger transactions, which provides the FDIC's interpretation of the BMA and its approach to review merger transactions. While the FDIC Proposal includes indications of potential coordination with, or considerations of view of, the DOJ and other agencies, it also makes it clear that the FDIC would undertake an independent review consistent with the statutory factors of the BMA. The FDIC proposal includes differing merger review considerations that may be viewed as more stringent than those proposed by the OCC. On the other hand, the indication from the Board of Governors of the Federal Reserve System (FRB) is that the FRB does not intend to follow the OCC or the FDIC to update its guidance relating to bank merger reviews. If the agencies do not ultimately adopt similar guidelines or approaches to reviewing merger applications, this could increase the potential for regulatory arbitrage among merger participants. For example, a state-chartered, FRB member institution that was equally sized to a target would potentially face less regulatory risk to closing the transaction than a similarly sized competing bidder that is a national bank. Such a disparity in regulatory approaches to BMA applications may also influence that choice of which bank charter survives a transaction if there is a proposed combination between a federally-chartered institution and a state-chartered institution, or between a state member bank and a state non-member bank, given that the primary federal regulator of the resulting institution will review and approve the transaction.

### **What About Bank Failures**

It is also unclear how these factors would be applied in the resolution context. As exhibited last spring in the resolution of First Republic Bank,

sometimes it is necessary for an institution with more than \$50 billion in assets, or even a G-SIB, to acquire a failed institution under the least cost resolution doctrine.<sup>15</sup> Failed bank transactions are by design conducted on an expedited basis. By eliminating expedited processing of applications and adding potential new regulatory hurdles regarding the relative and absolute size of the acquiring institution, the Proposed Policy Statement may result in it being more efficient for an institution to wait for a target bank to fail rather than acquiring it in a troubled condition.

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<sup>15</sup> Acting Comptroller Hsu who also sits on the board of the FDIC indicated that the least cost test could be formed in different ways, suggesting that the highest bid is not the only determining factor.