

# Memorandum

## OCC Proposes Changes to Bank Merger Review Process

January 31, 2024

On January 29, 2024, the OCC issued proposed changes to the agency's procedures for processing bank merger applications and also proposed guidelines explaining how the OCC currently evaluates such applications. Acting Comptroller Michael Hsu previewed the proposal during a speech that day at the University of Michigan School of Business but has mentioned previously that the agency was considering possible modifications to its approach to merger reviews.

In providing context for the OCC's proposal, Acting Comptroller Hsu suggested that policy makers and other stakeholders need to develop a macro view of what the banking system should look like and how many banks there should be. He quoted Prof. Jeremy Kress' assertion that "the U.S. banking system is highly concentrated" but also noted that there are different perspectives on what the banking system should look like and that "each path would result in a very different-looking banking system with different abilities to support the diversity, dynamism, and size of the economy."

Acting Comptroller Hsu also endorsed the view of the Department of Justice (the "DOJ") antitrust head Jonathan Kanter that bank antitrust analysis needs to move beyond retail deposits as a proxy for market share and "formulate a new framework" for assessing competition in the banking industry. Neither Hsu's speech nor the proposal contain any new antitrust guidance, however, and simply note that collaboration on this subject with the DOJ "is ongoing."

### General Principles of Review

In his speech, Acting Comptroller Hsu stated that the proposed policy statement establishes "chalk lines" demarcating characteristics of applications that may be consistent with timely approval and those that would be inconsistent with approval. Hsu noted that a majority of applications "lie somewhere in between" these chalk lines. While most of the proposal's listed indicators of applications consistent with approval (*e.g.*, well-capitalized status and strong supervisory ratings) or disapproval (*e.g.*, unsatisfactory CRA ratings or supervisory ratings) are well-known, the proposal includes some size-related factors not previously articulated by the regulators. Transactions where the combined bank has less than \$50 billion in total assets and transactions where the target's total assets are less than or equal to 50% of the acquirer's assets are on the "consistent with approval" list, while global systemically important banking organization or "GSIB" status is an indicator that raises regulatory concerns that would need to be addressed or remediated. The proposal does not provide guidance as to how the OCC will view transactions that fall between these poles.

## Factors for Review

The proposed policy statement also provides guidance on how the OCC evaluates some of the required factors under the Bank Merger Act. Many of the considerations discussed in the proposal are well understood and reflect long-held practices of the OCC and other federal banking agencies. However, as discussed below, the OCC did add some considerations that are novel or provide a new gloss on previous practices.

### FINANCIAL STABILITY

- The OCC noted that it will review the financial stability factors individually and collectively. The OCC also noted that it will apply a balancing test when reviewing the impacts on financial stability to determine how the financial stability risk posed by the proposed transaction weighs against the financial stability risk posed by denial of the proposed transaction, particularly if the proposed transaction involves a troubled target.
- Although not a new concept, the proposal notes that the OCC may use commitments to address concerns under this factor, such as requiring asset divestitures by the resulting institution or imposing higher minimum capital requirements. The OCC may also consider whether enhanced prudential standards applicable as a result of the proposed transaction would offset any potential risks.

### FINANCIAL AND MANAGERIAL RESOURCES AND FUTURE PROSPECTS

- The proposal explicitly notes that the OCC will be less likely to approve applications involving an acquirer that has engaged in multiple acquisitions with overlapping integration periods, experienced rapid growth, or is functionally the target in the transaction. These acquirer characteristics have not necessarily been road blocks to approval in the past.
- The proposed policy statement also indicates that the OCC will give greater consideration than under its historical practice to systems compatibility and overall integration planning, including systems and information security processes, products, services, employees, and cultures. The proposal states that the OCC may impose written conditions, including requirements and time frames for remediation, if it determines that IT systems compatibility and integration represent a significant supervisory concern.

### CONVENIENCE AND NEEDS

- The proposed policy statement clarifies that the OCC views the Convenience and Needs factor as forward-looking and distinct from the bank's record in complying with the Community Reinvestment Act, and also confirms that applicants will be expected to show prospective benefits to the communities served after the transaction is consummated.
- The OCC will continue to consider planned branch closures and consolidations in low-or-moderate-income areas and changes to availability or cost of services in evaluating this factor. However, the proposal also states that the OCC will now consider job losses or reduced job opportunities under this factor.

Historically, federal banking regulators have not directly considered job losses in connection with bank merger applications, and have clearly stated that job losses are beyond the statutory factors that they are authorized to consider under applicable bank merger statutes.

- The proposal specifically states that the OCC will consider community investment and development initiatives, and efforts to support affordable housing and small business when reviewing an application. Historically, the federal banking agencies have used information provided on these topics as helpful support for an application but inclusion in this proposal suggests the possibility of a more direct evaluation of adequacy. This is a clear nod to community groups and what has become a shadow process of entering into community benefit plans in connection with larger proposed transactions.

### Procedural Changes

The proposal also includes several technical changes to the application forms and timelines for approval of transactions that qualify for expedited processing.

- Although rarely (if ever) used, the OCC is proposing to eliminate the current regulatory provision that deems an expedited application approved by the OCC as of the 15th day after the close of the comment period, unless the OCC notifies the applicant that the filing is not eligible for expedited review, or the expedited review process is extended.
- The OCC is also proposing to eliminate the streamlined Bank Merger Act application form. This form is helpful for small, non-controversial transactions, including asset purchases and reorganizations. Although the OCC suggests that it may waive certain information required in the full Bank Merger Act application if it is not relevant to a particular transaction, the likely result of this proposed change will be lengthier applications and increased processing time.

Although not a technical change to its current processes, the OCC also outlined situations where it may consider extending the normal 30 day public comment period, including transactions in which public meetings are held to allow for public comment after the meeting and for unusual transactions (*e.g.*, novel or complex transactions). The preamble also notes that the OCC may extend the comment period if a filer's response to a comment does not fully address the matters raised in the comment and the commenter requests an opportunity to respond. This is not a new concept but suggests longer comment periods and even more attention on commenters.

The proposal also contains guidance on when the OCC may decide to hold public meetings on a merger application. The criteria include the size of the transaction—for example, a resulting institution having \$50 billion or more in assets—and concentration in one or more markets.

If adopted, the proposed policy statement will likely result in lengthier applications and longer processing periods, thereby exacerbating industry concerns with long and unpredictable processing periods. As noted above, the proposal does not propose any modifications to the OCC's review of the competitive factors under the Bank

Merger Act, noting that those are still under interagency review. It is not clear if the Federal Reserve and FDIC will follow the concepts in this proposal or take alternate paths.

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