

February 26, 2024

OCC Issues Proposed Rule on Bank Merger Review

I. Executive Summary

On January 29, 2024, the Office of the Comptroller of the Currency (“OCC”) issued a notice of proposed rulemaking (the “NPR”)¹ to update its current rules for business combinations involving national banks and federal savings associations, including a policy statement that describes the standards for the OCC’s review of business combinations under the Bank Merger Act (“BMA”) (the “Policy Statement”). The NPR follows the OCC’s comprehensive review of bank merger policies and regulations that included a symposium on bank mergers in February 2023, and coincided with remarks from Acting Comptroller of the Currency Michael J. Hsu at the University of Michigan regarding the OCC’s approach.² As Acting Comptroller Hsu explained in his remarks, the NPR reflects a new approach to bank merger review, in which the OCC takes a “macro” view and will evaluate bank mergers on their overall impact on the diversity and dynamism of the U.S. banking system.³

The NPR would introduce a Policy Statement that describes the principles the OCC will use to evaluate BMA applications, including indicators that point in favor of likely approval or rejection. The NPR would also make two procedural amendments to the OCC’s bank merger review: it would (a) eliminate the OCC’s expedited bank merger review procedures⁴ and (b) eliminate the OCC’s streamlined application, which applicants are currently permitted to use in limited circumstances.⁵ The stated objectives of these proposed changes are to enhance transparency, foster greater trust in the regulatory process and better align the OCC’s oversight of bank mergers with contemporary economic and competitive considerations in the banking sector.⁶ However, there remains substantial uncertainty about how the factors described in the Policy Statement would apply to the majority of proposed combinations under the BMA.

The OCC is accepting comments on the NPR through April 13, 2024.⁷

II. Background

The NPR comes amid a broader reexamination of bank merger policies by the OCC, the Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation (“FDIC”) (collectively, the “Agencies”) in the wake of President Biden’s Executive Order 14036, *Executive Order on Promoting Competition in the American Economy*, issued in July 2021 (the “Executive Order”).⁸ The Executive Order calls for the “Attorney General, in consultation with the Chairman of the Board of Governors of the Federal Reserve System, the Chairperson of the Board of Directors of the Federal Deposit Insurance Corporation, and the Comptroller of the Currency . . . to review current practices and adopt a plan . . . for the revitalization of merger oversight under the Bank Merger Act and the Bank Holding Company Act of 1956.”⁹ The Executive Order also urged the Department of Justice (“DOJ”) and the Agencies to update bank merger guidelines to “provide more robust scrutiny of mergers.”¹⁰

Following the Executive Order, both the DOJ Antitrust Division and the FDIC took steps to assess and potentially revise their approaches to bank mergers. In December 2021, the DOJ sought public comments on potential revisions to its 1995 bank merger competitive review guidelines, which guide the competition review of bank mergers. Separately, in December 2023, the DOJ and Federal Trade Commission released joint final merger guidelines that guide the antitrust review for mergers that do not involve banks.¹¹ Meanwhile, in March 2022, the FDIC requested information on various issues related to bank merger transactions.¹²

The NPR is part of a coordinated policy shift across federal departments and agencies in response to the Executive Order. Coordination among the DOJ, OCC and FDIC reflects a concerted effort to ensure consistent merger analysis and to respond to the Executive Order's call for more active scrutiny of merger activity.

III. Overview of the OCC's Current Merger Review Framework

The OCC's review of mergers and related business combinations of banks and federal savings associations is governed by the BMA, Section 18(c) of the Federal Deposit Insurance Act,¹³ and the OCC's implementing regulation, 12 C.F.R. § 5.33 ("Section 5.33"). The BMA defines the parameters that the OCC must take into account when evaluating merger review applications. To comply with the BMA, the OCC must consider: (a) competition; (b) the financial and managerial resources and future prospects of the existing and proposed institutions; (c) the convenience and needs of the community served; (d) the risk to the stability of the United States banking or financial system; (e) the effectiveness of any involved insured depository institutions in combatting money laundering; and (f) compliance with deposit concentration limits for interstate merger transactions.¹⁴ Section 5.33 and relevant portions of the OCC's *Comptroller's Licensing Manual* provide guidance on the OCC's current approach to merger review.¹⁵

IV. The NPR's Procedural Changes to Bank Merger Review

The NPR amends Section 5.33 to eliminate expedited review procedures and the use of streamlined applications. The OCC's elimination of these provisions is driven by its view that any business combination or merger is a "significant corporate transaction" that warrants full review by the OCC.

A. Elimination of Expedited Review Procedures

The OCC proposes to eliminate expedited review procedures to better reflect its current view that any business combination is a "significant corporate transaction" that should not be approved "solely due to the passage of time."¹⁶ The NPR would remove paragraph (i) of Section 5.33, which currently provides that a filing that qualifies as a business reorganization under 12 C.F.R. § 5.33(d)(3) or as a streamlined application under 12 C.F.R. § 5.33(j) is deemed approved 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.¹⁷

However, the OCC notes that the underlying principles that currently inform Section 5.33(i) would continue to guide the OCC's review of bank merger applications.¹⁸

B. Elimination of Streamlined Business Combination Applications

The OCC proposes to remove paragraph (j) of Section 5.33, which currently specifies four situations¹⁹ in which an applicant may use the OCC's streamlined business combination application rather than the full Interagency Bank Merger Act Application ("IBMAA").²⁰ While the streamlined application requires similar information as the IBMAA, the streamlined application only requires an applicant to provide detailed information if the applicant responds in the affirmative to one of several yes-or-no questions. Under the current rule, transactions eligible for a streamlined application also qualify for expedited review, which partly informs the OCC's decision to eliminate streamlined applications altogether.²¹

The OCC takes the view that a removal of the streamlined business combination form should not materially increase the burden on applicants who would otherwise have qualified for the expedited procedures because the OCC retains the discretion to tailor the information requested under the IBMAA to suit a particular application, though the OCC does not explain in detail the circumstances in which it would engage in such tailoring.²²

V. The Policy Statement

The stated objectives of the Policy Statement are to facilitate transparency, interagency coordination, and public engagement by providing stakeholders and the general public with a better understanding of how the OCC reviews applications under the BMA.²³ It is also informed by the OCC's desire to expand the factors described in the current *Comptroller's Licensing Manual*,

which the OCC believes does not sufficiently capture all of its considerations regarding the BMA statutory factors and related processes, such as decisions to hold public meetings.²⁴

A. General Principles of OCC Review

The Policy Statement outlines the general principles that the OCC will apply when reviewing applications, and provides information about how the OCC evaluates certain statutory factors in the BMA: (i) financial stability, (ii) financial and managerial resources and (iii) convenience and needs of the community.²⁵ The Policy Statement also outlines a non-exhaustive list of factors that the OCC will treat as indicators of likely approval, stating that applications “consistent with approval generally feature *all* of the following indicators”:

1. The acquirer is well capitalized under 12 C.F.R. § 5.3 and the resulting institution will be well capitalized;
2. The resulting institution will have total assets less than \$50 billion;
3. The acquirer has a Community Reinvestment Act (“CRA”) rating of Outstanding or Satisfactory;
4. The acquirer has composite and management ratings of 1 or 2 under the Uniform Financial Institution Ratings System (“UFIRS”) or risk management, operational controls, compliance and asset quality (“ROCA”) rating system;
5. The acquirer has a consumer compliance rating of 1 or 2 under the Uniform Interagency Consumer Compliance Rating System (“CC Rating System”), if applicable;
6. The acquirer has no open formal or informal enforcement actions;
7. The acquirer has no open or pending fair lending actions, including referrals or notifications to other agencies;
8. The acquirer is effective in combatting money laundering activities;
9. The target’s combined total assets are less than or equal to 50% of acquirer’s total assets;
10. The target is an eligible depository institution as defined in 12 C.F.R. § 5.3;
11. The proposed transaction clearly would not have a significant adverse effect on competition;
12. The OCC has not identified a significant legal or policy issue; and
13. No adverse comment has raised a significant CRA or consumer compliance concern.²⁶

The Policy Statement also contains a list of issues that raise supervisory or regulatory concerns and make it unlikely that the OCC will find that the BMA factors have been met until or unless they have been addressed or remediated:

1. The acquirer has a CRA rating of Needs to Improve or Substantial Noncompliance.
2. The acquirer has a rating of 3 or worse under the CC Rating System.
3. The acquirer has UFIRS or ROCA composite or management ratings of 3 or worse or the most recent report of examination otherwise indicates that the acquirer is not financially sound or well managed.
4. The acquirer is a global systemically important banking organization, or subsidiary thereof.
5. The acquirer has open or pending Bank Secrecy Act/anti-money laundering enforcement or fair lending actions, including referrals or notifications to other agencies.
6. Failure by the acquirer to adopt, implement and adhere to all the corrective actions required by a formal enforcement action in a timely manner; or multiple enforcement actions against the acquirer executed or outstanding during a three-year period.²⁷

1. Financial Stability

The Policy Statement describes the factors the OCC will consider when evaluating the financial stability factor under the BMA. The OCC will apply the stated factors in a balancing test that would consider each factor individually and in combination, with the risk that even one factor may lead the OCC to conclude that the proposed combination would have an adverse effect on financial stability.²⁸ To address financial stability risk concerns, the OCC may require asset divestitures, impose higher minimum capital requirements or other conditions.²⁹

The OCC will consider the following financial stability factors: (i) whether the size of the combined institutions would result in material increases in risk to financial stability; (ii) potential reduction in the availability of substitute providers for the services

offered by the combining institutions; (iii) whether the resulting institution would engage in business activities or participate in markets that may cause significant risks to financial stability; (iv) the impact on the complexity of the financial system; (v) the extent of cross-border activities; (vi) the difficulty of resolving or winding up the resulting institution's business in the event of a failure or insolvency; and (vii) any other factors that indicate a risk to the financial system.³⁰

2. *Financial and Managerial Resources and Future Prospects*

The Policy Statement describes the OCC's position on financial and management resources and future prospects factors in the BMA, explaining that it considers these factors both independently and holistically for the combining and resulting institutions, and tailors its evaluation to the size, complexity and risk profile of the parties to the transaction.³¹ The OCC indicates that it is unlikely to approve combinations when the acquirer has a "less than satisfactory" supervisory record, when it has experienced rapid growth, when it has engaged in multiple acquisitions with overlapping integration periods, has failed to comply with conditions imposed in prior OCC licensing decisions or is functionally the target in the transaction.³²

When evaluating the financial resources factor, the OCC will review current and pro forma capital levels for both the existing and proposed institutions, and an acquirer with a strong supervisory record related to capital, liquidity and earnings is "more likely" to satisfy the financial resources factor.³³ The OCC notes that it will closely scrutinize transactions that increase the risks that arise from any of the categories of risk in the OCC's Risk Assessment System, and will consider management's ability to address increased risks.³⁴

The OCC will evaluate the managerial resources factor by considering the supervisory record and current condition of both the acquirer and the target, as well as management ratings and proposed governance structure. For example, a significant number of MRAs will suggest that there are insufficient managerial resources.³⁵ In order to facilitate the OCC's review of the acquirer's due diligence of the target, management should be prepared to demonstrate its plans and ability to remediate the acquirer's and target's previously identified weaknesses, and engage in risk management appropriate to the size, complexity and profile of the resulting institution.³⁶ Systems integration concerns may also lead to additional review, and identifying overreliance on manual controls is a "critical component" of integration plans.³⁷

The OCC suggests that its determination of the future prospects factor will hew closely to its findings on the financial and managerial resources factors, and will also consider the acquirer's record of integrating acquisitions when determining the degree of scrutiny to apply.³⁸

3. *Convenience and Needs*

The Policy Statement explains that the OCC's review of the convenience and needs factor is prospective, and based on the "probable effects" of the proposed combination on the community to be served.³⁹ The OCC will consider a range of factors, including: (i) closure, expansion, or consolidation of branches or branching services, including in low-or-moderate income areas; (ii) reduction of the availability or increase the cost of banking services or products; and (iii) proposed community outreach and engagement strategies regarding the development of community investment initiatives.⁴⁰ The OCC states that it will consider an applicant's past record of CRA performance, but that such review is "separate and distinct" from its forward-looking consideration of the convenience and needs factor.⁴¹

B. Public Comments and Meetings

The OCC also provides additional details about its approach to public comments and meetings. The OCC may extend the comment period on a bank merger application beyond the standard 30 days when a filer fails to provide all required publicly available information on a timely basis, when a filer makes a request for confidential treatment not granted by the OCC or when a commenter requests an opportunity to respond to a filer that does not fully address a comment.⁴² Comment periods may also

be extended when other extenuating circumstances exist, including when the OCC determines that the transaction at issue is novel or complex, or natural disasters affect the public's ability to submit timely comments.⁴³

The OCC seeks oral input through public hearings, public meetings and private meetings, although the BMA does not require them. The OCC will decide whether to hold public meetings by balancing the public's interest in the transaction with the value or harm of a public meeting to the decision-making process.⁴⁴

VI. Conclusion

The NPR marks a major advance toward the fulfillment of the Agencies' efforts to renew their approach to bank merger review. The NPR offers a useful step toward greater transparency in the review process, although substantial opportunities for progress remain. Under the OCC's proposed framework, potential business combinations are likely to fall into one of three categories. The NPR offers some guidance as to the likely fate of BMA applications that fall into the first two categories: those that are "straightforward" and will likely meet with approval, and those that the OCC is most likely to deny. However, the largest proportion of BMA applications are likely to fall in the vast middle in between these "chalk lines,"⁴⁵ and the NPR leaves considerable uncertainty as to how those applications will fare in the future.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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- ¹ Business Combinations under the Bank Merger Act, 89 Fed. Reg. 10010 (Feb. 13, 2024) (to be codified at 12 C.F.R. pt. 5), <https://www.govinfo.gov/content/pkg/FR-2024-02-13/pdf/2024-02663.pdf>.
- ² Michael J. Hsu, Acting Comptroller of the Currency, “What Should the U.S. Banking System Look Like? Diverse, Dynamic, and Balanced,” Remarks at the University of Michigan School of Business (Jan. 29, 2024) (“Hsu Remarks”), <https://www.occ.gov/news-issuances/speeches/2024/pub-speech-2024-6.pdf>.
- ³ *Id.* at 3.
- ⁴ 89 Fed. Reg. at 10011.
- ⁵ *Id.*; see *infra* note 19.
- ⁶ See 89 Fed. Reg. at 10011, 10016; see also Hsu Remarks at 12, 16.
- ⁷ 89 Fed. Reg. at 10010.
- ⁸ Exec. Order No. 14,036, Executive Order on Promoting Competition in the American Economy (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.
- ⁹ *Id.*
- ¹⁰ FACT SHEET: Executive Order on Promoting Competition in the American Economy (July 9, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>.
- ¹¹ Merger Guidelines, U.S. Dep’t of Justice and Fed. Trade Comm’n (Dec. 18, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/P234000-NEW-MERGER-GUIDELINES.pdf. Note that these guidelines are for general antitrust review; the DOJ’s revised bank merger review guidelines have yet to be issued.
- ¹² FDIC, Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions, 87 Fed. Reg. 18740 (Mar. 31, 2022), <https://www.govinfo.gov/content/pkg/FR-2022-03-31/pdf/2022-06720.pdf>.
- ¹³ 12 U.S.C. § 1828(c).
- ¹⁴ *Id.* § 1828(c)(5), (11); 12 C.F.R. § 5.33(e)(1)(ii).
- ¹⁵ 12 C.F.R. § 5.33; Office of the Comptroller of the Currency, Dep’t of the Treasury, *Comptroller’s Licensing Manual*, “Business Combinations” (January 2021), <https://www.occ.treas.gov/publications-and-resources/publications/comptrollers-licensing-manual/files/pub-lm-business-combinations.pdf>.
- ¹⁶ 89 Fed. Reg. at 10011; see Hsu Remarks at 15.
- ¹⁷ 89 Fed. Reg. at 10011.

18 *Id.*

19 Paragraph (j) of Section 5.33 authorizes use of a streamlined application if:

- (i) at least one party to the transaction is an eligible bank or eligible savings association, and all other parties to the transaction are eligible banks, eligible savings associations or eligible depository institutions, the resulting national bank or resulting Federal savings association will be well capitalized immediately following consummation of the transaction, and the total assets of the target institution are no more than 50% of the total assets of the acquiring bank or Federal savings association, as reported in each institution's Consolidated Report of Condition and Income filed for the quarter immediately preceding the filing of the application;
- (ii) the acquiring bank or Federal savings association is an eligible bank or eligible savings association, the target bank or savings association is not an eligible bank, eligible savings association, or an eligible depository institution, the resulting national bank or resulting Federal savings association will be well capitalized immediately following consummation of the transaction, and the filers in a pre-filing communication request and obtain approval from the appropriate OCC licensing office to use the streamlined application;
- (iii) the acquiring bank or Federal savings association is an eligible bank or eligible savings association, the target bank or savings association is not an eligible bank, eligible savings association, or an eligible depository institution, the resulting bank or resulting Federal savings association will be well capitalized immediately following consummation of the transaction, and the total assets acquired do not exceed 10 percent of the total assets of the acquiring national bank or acquiring Federal savings association, as reported in each institution's Consolidated Report of Condition and Income filed for the quarter immediately preceding the filing of the application; or
- (iv) in the case of a transaction under § 5.33(g)(4) of this section, the acquiring bank is an eligible bank, the resulting national bank will be well capitalized immediately following consummation of the transaction, the filers in a pre-filing communication request and obtain approval from the appropriate OCC licensing office to use the streamlined application, and the total assets acquired do not exceed 10 percent of the total assets of the acquiring national bank, as reported in the bank's Consolidated Report of Condition and Income filed for the quarter immediately preceding the filing of the application.

12 C.F.R. § 5.33(j).

20 89 Fed. Reg. at 10011.

21 *Id.*

22 *Id.* The OCC notes that, under 12 C.F.R. § 5.2(b), it "may adopt materially different procedures for a particular filing or class of filings as it deems necessary, for example, in exceptional circumstances or for unusual transactions, after providing notice of the change to the filer and to any other party that the OCC determines should receive notice. The OCC may use this authority, if appropriate, to reduce informational requirements in transactions involving a failing bank due to the short time for preparation of applications." *Id.*

23 *Id.*

24 *Id.* at 10010–11.

25 *Id.* at 10012. Note that the Policy Statement does not address the BMA's statutory factors related to competition and money laundering, which will continue to be guided by existing interagency guidelines. See 12 U.S.C. § 1828(c)(5), (11); 89 Fed. Reg. at 10012 n.11; Bank Merger Competitive Review – Introduction and Overview (1995), <https://www.justice.gov/sites/default/files/atr/legacy/2007/08/14/6472.pdf>; Fed. Fin. Inst. Examination Council, *Bank Secrecy Act and Anti-Money Laundering Examination Manual*, https://bsaaml.ffiec.gov/docs/manual/01_Introduction/01.pdf.

26 89 Fed. Reg. at 10016.

27 *Id.*

28 *Id.* at 10017.

29 *Id.*

30 *Id.* at 10016–17.

31 *Id.* at 10017.

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*

³⁶ *Id.*

³⁷ *Id.* 10017–18.

³⁸ *Id.* at 10018.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 16.