
OCC Proposes New Bank Merger Rules and Policy Statement

On Monday, January 29, the Office of the Comptroller of the Currency (OCC) published a proposal to update its procedural rules and issue a new policy statement on bank merger review (the **OCC Proposal**). In accompanying remarks at the University of Michigan, Acting Comptroller of the Currency Michael Hsu explained that the OCC Proposal is intended to improve transparency around the agency's approvals and denials of merger applications.

Specifically, the OCC Proposal identifies and describes 13 features that, when present in combination, would weigh in favor of approving a merger application. It also highlights six features that raise "supervisory or regulatory concerns" and would create a presumption of denial for applications containing them. Together, the proposed changes would mark noteworthy departures from prior practice, including by:

- Creating an uncertain framework for any merger that would result in an institution with over \$50 billion in assets—well below the size at which the OCC has historically applied enhanced scrutiny to proposed transactions.
- Establishing a formal presumption that proposed acquisitions by a global systematically important banking organization (G-SIB) or a G-SIB's subsidiary will be denied.
- Applying enhanced scrutiny to a proposed merger's effects on the community, especially when the transaction could result in reductions in services or layoffs for bank employees, and to community investment or development initiatives proposed in connection with an application.
- Applying enhanced scrutiny to acquisitions by fast-growing banks or "serial acquirers" and increasing scrutiny of the acquirer's integration plans.

If finalized, the OCC Proposal would likely speed review and approval of transactions involving smaller, well-managed acquirers. Larger transactions, however, would face the prospect of prolonged review or even disapproval, seeding storm clouds over bank merger activity in a year that many had hoped would bring a rebound from the historically low levels seen in 2023. Acting Comptroller Hsu has also indicated the OCC will continue to be active in this area—publishing detailed data and a report on bank merger transactions over the coming months.

Below, we detail and analyze the key aspects of the OCC Proposal against the backdrop of the current framework governing federal agencies' review of banking mergers and recent developments. We then highlight implications of the OCC Proposal for the merger market, key open questions, and areas of interest for stakeholders to consider as they review and comment on the proposal.

The Current Framework for Bank Merger Review: Overview and Recent Developments

Bank mergers in the U.S. are reviewed by the federal banking agency or agencies responsible for supervising the resulting organization and by the Department of Justice (DOJ).¹ The responsible banking agencies are required to conduct a broad evaluation of each proposed transaction and approve it only if doing so would be consistent with specific enumerated criteria. This analysis has traditionally focused on four key areas that have become known as the “competitive,” “managerial,” “convenience and needs,” and “financial stability” factors.² The DOJ plays a narrower role under the bank merger statutes, which require it to provide a report to the responsible banking agency on the competitive factors involved in a proposed merger and to challenge (within 30 days) a merger the DOJ believes would violate the antitrust laws but that has been approved by the relevant banking agency.³

The competitive effects of a proposed bank merger are analyzed under a well-defined framework set out in joint guidelines from the DOJ, Federal Reserve, and OCC and substantially adopted by the FDIC.⁴ Under these guidelines, last updated in 1995, the DOJ and banking agencies focus principally on deposit market structure in areas of geographic overlap between the parties’ branches as a proxy for competition in the “cluster of products ... and services” that makes up commercial banking.⁵ The banking agencies have provided less guidance on how they analyze the managerial, convenience and needs, and managerial factors, however, and what guidance they have provided has not been on an interagency basis.⁶ Instead, the banking agencies have favored a common law approach, developing their analytical framework for these factors through numerous prior orders on merger proposals.

There has long been consensus that the 1995 Guidelines have become outdated. Consumers increasingly rely on electronic delivery channels that were not available in 1995, and banks compete with a broader variety of nonbank and

¹ Bank merger transactions are reviewed under the Bank Merger Act by the Board of Governors of the Federal Reserve System (Federal Reserve) for state member banks; the Federal Deposit Insurance Corporation (FDIC) for state non-member banks; and the OCC (together with the Board and FDIC, the **banking agencies**) for national banks and federal savings associations. Most transactions are also reviewed by the Federal Reserve under the Bank Holding Company Act or the Home Owners’ Loan Act (together with the Bank Merger Act, the **bank merger statutes**) because they involve a holding company acquiring a bank or a savings and loan association.

² Specifically, the bank merger statutes require the responsible banking agencies to consider transaction’s effect on competition, the financial and managerial resources and future prospects of the existing and proposed institutions, the convenience and needs of the community to be served, and the risk to the stability of the United States banking or financial system, although there are minor differences in the wording of each statute. The bank merger statutes also include other factors, such as the effectiveness of the insured depository institutions involved in combatting money laundering and limitations on interstate merger transactions.

³ See 12 U.S.C. §§ 1828(c)(6); 1849(b)(1); and 1467a(e)(2).

⁴ U.S. Department of Justice, *Bank Merger Competitive Review -- Introduction and Overview* (1995) (**1995 Guidelines**); Federal Deposit Insurance Corporation, *Statement of Policy Regarding Bank Merger Transactions*, 63 Fed. Reg. 44761, 44763 (Aug. 20, 1998). The Federal Reserve and DOJ have also issued frequently asked questions further describing their analysis. Board of Governors of the Federal Reserve System, *How do the Federal Reserve and the U.S. Department of Justice, Antitrust Division, analyze the competitive effects of mergers and acquisitions under the Bank Holding Company Act, the Bank Merger Act and the Home Owners Loan Act?* (Oct. 9, 2014).

⁵ See *United States v. Philadelphia National Bank*, 374 U.S. 321, 356 (1963). As referenced below, DOJ has expressed the view that the 1995 Guidelines’ analytical framework is outdated. In June 2023, Assistant Attorney General Jonathan Kanter stated that DOJ intends to update its analysis to include “all relevant dimensions of competition.” These include a bank merger’s impact on fees, interest rates, branch locations, product variety, network effects, interoperability and customer service. See Jonathan Kanter, Assistant Attorney General, *Remarks on Promoting Competition in Banking* (June 20, 2023).

⁶ See, e.g., Office of the Comptroller of the Currency, *Comptroller’s Licensing Manual: Business Combinations* (Jan. 2021); Federal Deposit Insurance Corporation, *Statement of Policy Regarding Bank Merger Transactions*, 63 Fed. Reg. 44761, 44763 (Aug. 20, 1998).

out-of-market financial service providers. Opponents of bank mergers have also criticized the banking agencies for underenforcing the bank merger statutes as a result of insufficiently developed frameworks for analyzing the managerial, convenience and needs, and financial stability factors.⁷

This disconnect has led to increased speculation in recent years around whether and when the DOJ and banking agencies will revise these frameworks. To that end, the DOJ requested comment on whether to revise the 1995 Guidelines in both 2020 and 2021;⁸ President Biden issued a sweeping executive order that “encouraged” the DOJ to “revitalize bank merger oversight” in consultation with the banking agencies in 2021;⁹ the FDIC requested information from the public about bank mergers in 2022;¹⁰ and policymakers at the DOJ and banking agencies have maintained a drumbeat calling for updates or enhancements to the analytical framework for all four statutory factors.¹¹ Meanwhile, although there have been no formal changes, bank merger applications are moving at a historically slow pace,¹² and merging parties in some transactions have been required to make novel commitments to the banking agencies in order to close their deals.¹³

The resulting regulatory uncertainty, coupled with economic headwinds from high interest rates and significant mark-to-market losses in some banks’ held-to-maturity portfolios, caused 2023 to see record-low deal announcements and deal value for bank merger transactions. This is despite comments from senior policymakers—including Secretary of the Treasury Janet Yellen and Acting Comptroller Hsu—suggesting that further consolidation may be warranted or even healthy for the banking sector.¹⁴

What is the OCC Proposing?

Two things. First, the OCC Proposal would revise the agency’s regulations implementing the Bank Merger Act to remove certain provisions that allow a subset of lower-risk mergers to be deemed approved by OCC inaction or to use a streamlined application form.¹⁵

⁷ See, e.g., Senator Elizabeth Warren, *Senator Warren Urges Financial Regulators to Promote Greater Competition in Banking, Strengthen Bank Merger Review Guidelines* (June 27, 2023); Senators Sherrod Brown, Jack Reed, Elizabeth Warren, and John Fetterman, *In The Wake of Recent Bank Failures, Brown, Colleagues Urge Federal Reserve to Overhaul Big Bank Merger Policy* (Aug. 9, 2023).

⁸ U.S. Department of Justice, *Antitrust Division Seeks Public Comments on Updating Bank Merger Review Analysis* (Sept. 1, 2020); U.S. Department of Justice, *Antitrust Division Seeks Additional Public Comments on Bank Merger Competitive Analysis* (Dec. 17, 2021).

⁹ Executive Order No. 14036, *Promoting Competition in the American Economy*, 86 Fed. Reg. 36987 (July 9, 2021).

¹⁰ Federal Deposit Insurance Corporation, *Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions*, 87 Fed. Reg. 18740 (Mar. 31, 2022).

¹¹ See, e.g., Martin J. Gruenberg and Rohit Chopra, *Joint Statement on Request for Public Comment on the Bank Merger Act* (Dec. 9, 2021); Michael J. Hsu, Acting Comptroller of the Currency, *Remarks on Bank Mergers and Industry Resiliency* (May 9, 2022); Michael S. Barr, Vice Chair for Supervision of the Board of Governors of the Federal Reserve System, *Remarks on Making the Financial System Safer and Fairer* (Sept. 7, 2022); Jonathan Kanter, Assistant Attorney General, *Remarks on Promoting Competition in Banking* (June 20, 2023).

¹² See, e.g., Jon Hill, *Banks’ Wait Time for Fed Deal Blessing Hits Decade High*, Law360 (May 24, 2023).

¹³ See, e.g., Zoe Sagalow, *Unusual Conditions in U.S. Bancorp Deal Approval Signal Greater Scrutiny Ahead*, S&P Global Market Intelligence (Oct. 27, 2022).

¹⁴ Andrew Duehren, *Janet Yellen Sees Bank Earnings Pressure, Mergers After March Crisis*, Wall Street Journal (June 23, 2023); Sam Sutton, *Hsu Makes a (Limited) Case for Large Bank Mergers*, Politico (July 11, 2023).

¹⁵ Removing the OCC’s streamlined application and approval provisions would require affirmative OCC approval for business reorganizations and certain acquisitions by “eligible banks” or “eligible savings associations” (well capitalized, well rated institutions not subject to any cease-and-desist order). 12 CFR 5.3.

Second, and more significantly, the OCC Proposal includes a policy statement identifying characteristics of mergers that are—or are not—likely to be approved. While the preamble to the proposal and Acting Comptroller Hsu’s accompanying remarks emphasize that these criteria are intended to reflect the OCC’s current analysis, the list includes several significant, unexplained departures from prior agency practice and interpretations. For example, any transaction resulting in an institution with \$50 billion or more in assets would not meet the OCC’s general criteria for “[a]pplications that are consistent with approval,” and the OCC indicates it would be unlikely to approve any transaction in which the acquirer is a global systemically important banking organization (G-SIB) or a subsidiary thereof.

The proposed policy statement also provides additional detail regarding the OCC’s framework for analyzing the managerial, convenience and needs, and financial stability factors in proposed merger transactions.¹⁶ Key aspects of each analysis are discussed below.

Managerial

The managerial factor has historically been underdeveloped in the banking agencies’ public-facing merger decisions apart from noting that the applicant’s financial performance, the experience of its management, and its supervisory record are consistent with approval. The OCC Proposal expands the agency’s consideration of the acquirer’s integration plans and articulates several additional expectations of merger applicants that are not clearly grounded in prior approvals. These include expectations that the managerial factor is not likely to be consistent with approval where the applicant:

- Has experienced rapid growth;
- Has engaged in multiple acquisitions with overlapping integration period; or
- Is functionally the target in the transaction.

Convenience and Needs

The OCC Proposal clarifies that the analysis of a proposed transaction under the convenience and needs factor is distinct from the analysis of the applicant’s and target’s record of compliance with the Community Reinvestment Act, which has historically represented the bulk of the agencies’ public-facing analysis of this factor. Specifically, the proposal explains that the agency would generally consider:

- Any plans to close, expand, consolidate, or limit branches or branching services, including in low- or moderate-income areas;
- Any plans to reduce the availability or increase the cost of banking services or products, or plans to provide expanded or less costly banking services or products to the community;
- The effect of the transaction on credit availability throughout the community;
- Job losses or reduced job opportunities from branch staffing changes;
- Community investment or development initiatives, including, for example, community reinvestment, community development investment, and community outreach and engagement strategies; and
- Efforts to support affordable housing initiatives and small businesses.

¹⁶ The preamble of the OCC’s proposal notes that the agency’s analysis of the competitive factor continues to be conducted under the 1995 Guidelines.

The OCC Proposal also includes criteria that the agency would consider in determining whether to extend the comment period or hold a public meeting for a proposed merger, which can cause significant delays in processing an application. These include:

- The public’s interest in the transaction;
- The likelihood a public meeting would document or clarify issues raised during the public comment process or provide new information;
- The significance of the transaction to the banking industry and to the communities affected; and
- The acquirer’s and target’s CRA, consumer compliance, fair lending, and other pertinent supervisory records, as applicable.

Financial Stability

The OCC Proposal generally would codify the approach to analyzing the effect on financial stability of a proposed transaction that has been articulated in OCC and Federal Reserve orders on applications involving a large resulting institution over the last decade. However, the OCC Proposal appears to place relatively greater emphasis on the agency’s ability to impose commitments or conditions—including divestitures or higher capital requirements—intended to mitigate a transaction’s risk to financial stability. Acting Comptroller Hsu also indicated in a question-and-answer session following his remarks announcing the proposal that the OCC would be carefully scrutinizing the resulting institution’s ability to be resolved swiftly without affecting the stability of the U.S. banking or financial system.

What’s Next? Small, Well-Managed Banks Get a Green Light; Mid-Sized and Large Institutions Should Exercise Caution

The OCC Proposal is likely to have significant effects on the bank merger market—not only regarding the national banks and federal savings associations to which it applies directly, but likely also to transactions outside of the OCC’s direct purview—as a sign of which way the regulatory winds are blowing.

Parties considering a merger transaction in the medium- or long-term (especially, but not only, national banks and federal savings associations) should carefully review the OCC Proposal to consider its implications and determine whether using the notice-and-comment process to express concerns or offer their perspectives may be warranted. We expect coming debates about the OCC Proposal to focus especially on:

- **Size-based presumptions regarding approvability.** The criteria for presumptive approvability include only resulting institutions smaller than \$50 billion, but only transactions involving G-SIBs or their subsidiaries are presumed likely to be denied. How the OCC will consider applications involving institutions between these goalposts is not clear, and we expect many to question whether bright-line distinctions of this sort are appropriate at all.
- **Areas where the OCC Proposal is underdeveloped.** The proposal generally does not address how the OCC will evaluate transactions that lack all 13 features of “generally approvable” transactions *but* do not present issues under any of the six criteria identified as warning signs. Most notably, it is not clear how the agency will analyze transactions that do not present indicia of “supervisory or regulatory concern” but would (i) result in an institution larger than \$50 billion, (ii) involve a target that is at least 50 percent as large as the acquirer, or (iii) involve a target that is not an “eligible institution.”

- **New factors where the OCC may not have considered unintended consequences of its approach.** Proposed presumptions against approvability, for example, where a formal acquirer is functionally the target in a transaction could have prevented the Banc of California-PacWest transaction, announced in July 2023, which is widely viewed as having stabilized a troubled depository institution without the need for government intervention.
- **Provisions developed in response to the March 2023 banking stress.** Some components within the OCC Proposal appear clearly tailored to prevent institutions similar in profile to Silicon Valley Bank, Signature Bank, and First Republic Bank from engaging in acquisitions, such as the adverse presumption under the managerial factor for fast-growing applicants. It remains to be seen how the OCC will balance concerns about “serial acquirers” and fast-growing banks with the reality that these are often the institutions with the most, and most recent, experience executing successful mergers.

All parties considering a merger transaction should also keep an eye on the horizon. The OCC Proposal differs from existing agency practice in several key areas. The Federal Reserve, for example, has explained in previous orders that job losses at the resulting organization and an applicant’s decision to execute a community benefits agreement fall outside of the factors it is authorized to consider by law.¹⁷ It would not be surprising to see the Federal Reserve or FDIC propose or seek comment on these areas—either to bring their practice into alignment with the OCC Proposal or to sharpen areas of disagreement if they do not view the OCC approach as advisable.

The OCC Proposal also leaves the competitive analysis framework of the 1995 Guidelines untouched. With work on generally applicable merger guidelines¹⁸ recently completed and elections later this year, it would not be surprising to see the DOJ and banking agencies turn to this unfinished business before year-end.

Despite these issues, the OCC Proposal is likely to wind up as good news for smaller bank mergers. Well capitalized, well managed applicants proposing transactions that would result in a depository institution under \$50 billion in assets are likely to benefit from increased regulatory certainty in both the negotiation and approval phases of a merger. This will be especially true where applicants are able to engage regulators early as key stakeholders or demonstrate the regulatory benefits of their transaction—the Federal Reserve approved Banc of California’s application to acquire PacWest Bancorp on October 19, 2023, just two months after receiving their merger application. With interest rates likely to begin falling later this year, institutions in this size bracket looking to make acquisitions could decide the time is right to be opportunistic and choose to structure their transaction to capitalize on the OCC’s apparent comfort with such transactions.

The OCC Proposal will be open for public comment for 60 days from the date of its publication in the Federal Register. We will continue to monitor developments and provide updates as appropriate.

¹⁷ See, e.g., Bank of Montreal, FRB Order No.2023-01 (Jan. 17, 2023); U.S. Bancorp, FRB Order No. 2022-22 (Oct. 14, 2022).

¹⁸ U.S. Department of Justice and Federal Trade Commission, *Merger Guidelines* (Dec. 18, 2023). The 2023 Merger Guidelines embrace a broader view of potential theories of anticompetitive harm and discount potential benefits associated with mergers.

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