

OCC Releases Notice of Proposed Rulemaking on Bank Mergers

February 1, 2024

On January 29, 2024, the Office of the Comptroller of the Currency (“OCC”) released a notice of proposed rulemaking (the “Proposal”) that would revise the OCC’s procedural rules around bank mergers and add a policy statement (the “Policy Statement”) summarizing the principles the OCC would use when evaluating bank merger proposals as an appendix to the OCC’s regulations regarding corporate activities.¹ The Proposal was released in connection with a long previewed speech by Acting Comptroller of the Currency Michael Hsu addressing bank merger review considerations. Comments on the Proposal are due on April 15, 2024. Release of the Proposal is part of the banking agencies’ and Department of Justice’s (“DOJ”) now years-long process of reconsidering the existing framework for evaluating bank mergers, punctuated by a July 2021 Executive Order in which President Biden directed the banking agencies and DOJ to “adopt a plan . . . for the revitalization of merger oversight.”² As with many other banking agency proposals during the Biden Administration, the Proposal appears to warrant engagement and comment by industry participants of all sizes and their trade groups.

In his speech, Hsu noted that the OCC continued to work with the other banking agencies to finalize revisions to the analytical framework for bank mergers. Moreover, the banking agencies also continue to consult with the DOJ with respect to the bank merger antitrust guidelines.³ While far from creating a clear roadmap for potential acquirers, the Proposal does provide some guidance as to the OCC’s expectations with respect to bank acquisitions. Given the coordination of the banking agencies, it also may provide insights as to the approach that will be taken by regulators in evaluating bank mergers generally.

¹ Business Combinations under the Bank Merger Act, 89 Fed. Reg. 10010 (Feb. 13, 2024).

² See our Debevoise In Depth on the Executive Order, available [here](#).

³ Acting Comptroller of the Currency Michael J. Hsu, What Should the U.S. Banking System Look Like? Diverse, Dynamic, and Balanced (“Hsu Speech”) (Jan. 29, 2024), available [here](#). The DOJ and Federal Trade Commission published revised merger guidelines on December 18, 2023. A Debevoise analysis of those guidelines is available [here](#).

As to the OCC's approach, the Proposal presages a more ambiguous, multi-faceted and complex merger evaluation process than what bank regulators historically have followed. For example, it would include consideration of issues such as job impacts which the agencies have expressly stated in the past were outside their review criteria.⁴ Combined with the increased supervisory scrutiny following the spring 2023 bank failures and the associated raft of proposed changes to the federal bank regulatory framework, including with respect to capital, long-term debt, resolution planning and liquidity, larger banks in particular may wish to revisit their regulatory approach to merger diligence and application components in the near term to put themselves in the best position to succeed in the new landscape when an opportunity arises.

Section I below discusses the proposed changes to the OCC's procedural rules. Section II discusses the proposed Policy Statement that also is included in the Proposal.

I. Procedural Changes

Under the OCC's current rules, specified merger applications (often based on the strength of the acquirer) may be eligible for streamlined applications or expedited review,⁵ allowing for less information and automatic approvals for certain applications. The Proposal would remove these streamlined application and expedited review processes, stating that business combinations are "significant corporate transaction[s] requiring OCC decisioning, which should not be deemed approved solely due to the passage of time."⁶ This change would increase the effort required for banks to pursue even "vanilla" transactions. Moreover, during periods of significant merger activity, required regulatory review of additional information may significantly slow approvals due to limited regulator bandwidth, regardless of the complexity of an application. Of potential benefit in limited circumstances, the Proposal does reserve the authority of the OCC to tailor business combination and reorganization applications, including in situations related to purchases of failed banks.

⁴ OCC, CRA Decision 177 (Application for the merger of First Niagara Bank, National Association, Buffalo, New York into KeyBank National Association, Cleveland, Ohio) at 25 n. 25 ("the potential for job losses is not a factor the OCC statutorily considers in connection with [a merger] application") (Sept. 16, 2016), available [here](#); FRB, Order Approving the Acquisition of a Bank (U.S. Bancorp) at 17 n. 43 ("the potential for job losses resulting from a merger is outside of the limited statutory factors that the Board is authorized to consider when reviewing an application or notice under the BHC Act."), available [here](#).

⁵ 12 CFR 5.33.

⁶ 89 Fed. Reg. at 10011.

Policy Statement

As indicated above, the Proposal also includes a policy statement designed to provide greater clarity as to the likelihood of success in obtaining OCC authorization for a particular acquisition strategy by: (1) outlining indicators consistent and inconsistent with OCC approval; (2) discussing how the OCC considers certain Bank Merger Act statutory factors in its approval process; and (3) addressing the OCC's criteria for extending a public comment period or holding a public meeting with respect to a transaction.

A. General Indicators

The proposed Policy Statement first discusses certain indicators that would be consistent or inconsistent with OCC approval of a merger application. For example, an acquirer having a composite and management rating of 2 or better would be consistent with approval, while having a less favorable rating would be inconsistent with approval. We include a comprehensive list of these indicators in [Appendix A](#).

Although designed to provide clarity to the OCC's approach, Acting Comptroller Hsu acknowledged during his speech that "most applications are likely to fall between" those with indicators entirely consistent with or inconsistent with approval and thus would "require varying degrees of scrutiny and multiple rounds of inquiry."⁷ For example, the Policy Statement would provide that mergers resulting in institutions with total assets of less than \$50 billion would be consistent with approval but mergers involving GSIBs or their subsidiaries would be inconsistent with approval. This would leave mergers involving banks with assets greater than \$50 billion but smaller and less complex than GSIBs in between these two parameters, and thus neither looked upon favorably or unfavorably under the Policy Statement.

B. Bank Merger Act Statutory Factors

The Bank Merger Act requires that the responsible banking agency, in evaluating a merger application, consider: (1) competitive factors; (2) the financial and managerial resources and future prospects of the combining and resulting institutions; (3) the convenience and needs of the community to be served; (4) financial stability risk to the U.S. banking or financial system; and (5) the effectiveness of the anti-money laundering programs of the insured depository institutions party to the merger.⁸ The Policy Statement discusses how the OCC evaluates these factors, although it does not address competitive factors (likely due to ongoing agency discussions with the DOJ) and anti-money laundering considerations in depth.

⁷ Hsu Speech at 15-16.

⁸ 12 USC 1828(c)(5), (11).

1. Financial Stability

Financial stability concerns are more likely to be relevant to mergers involving larger banks. For example, just a few months ago, the Federal Reserve Board (“FRB”) reaffirmed its long-held presumption that acquisitions of less than \$10 billion in assets or transactions resulting in firms with less than \$100 billion in total assets would not raise financial stability concerns.⁹ The Policy Statement does not include a potential asset threshold under which the OCC would presume an application would not raise financial stability concerns, however as a practical matter it is nonetheless only likely to be relevant to larger banks.

In considering the financial stability factor, the OCC would evaluate the existing criteria set forth in the banking agencies’ orders on applications since this factor was added to the Bank Merger Act by the Dodd-Frank Act in 2010. These criteria include: (1) size; (2) substitutability; (3) interconnectedness; (4) complexity; (5) cross-border activity; (6) resolvability; and (7) any additional factors posing risk to the U.S. banking or financial system. Notably, in proposing to codify its consideration of these criteria, the OCC may be signaling that it is rejecting calls, including from members of President Biden’s administration, that the banking agencies develop a new financial stability framework to evaluate risks related to mergers of large domestic banks.¹⁰

Moreover, the Policy Statement states that the OCC would apply a balancing test to weigh the financial stability risks of approving an application against the financial stability risks of *denying* an application. Though the banking agencies have previously mentioned that certain considerations may offset financial stability risks associated with large bank mergers, the Policy Statement appears to be the first time that a banking agency explicitly states that it applies a balancing test as part of its financial stability analysis.

Finally, in the discussion following his speech, Hsu noted that the resolvability criterion may be among the more important factors in the financial stability evaluation. Accordingly, and consistent with the OCC’s (and the FRB’s) conditions associated with a recent large bank merger,¹¹ future approvals may include confirmation that the resulting bank already meets stringent resolvability requirements, or at least makes commitments to do so promptly after the completion of the transaction.

⁹ FRB, Order Approving the Formation of a Bank Holding Company (NB Bancorp, Inc.) at 13–14 (Nov. 21, 2023), available [here](#); FRB, Order Approving the Merger of Bank Holding Companies (People’s United Financial, Inc.) at 25 (Mar. 16, 2017), available [here](#).

¹⁰ See Zoe Sagalow, Lauren Seay, OCC highlights priorities for creating ‘better mousetrap’ in bank M&A review, Reuters (Feb. 10, 2023) (reporting on Treasury Assistant Secretary for Financial Institutions Graham Steele, advocating for a new financial stability framework for regional bank mergers), available [here](#).

¹¹ OCC, Application to merge MUFG Union Bank, National Association, San Francisco, California with and into U.S. Bank National Association, Cincinnati, Ohio at 6 (Oct. 14, 2022), available [here](#); FRB, Order Approving the Acquisition of a Bank (U.S. Bancorp) at 38 n. 71, available [here](#).

2. Financial and Managerial Resources; Future Prospects

The Policy Statement would build on the OCC's existing guidance with respect to the financial and managerial resources and the future prospects of the combining and resulting institutions. For example, the Policy Statement would provide that the OCC may not approve a transaction resulting in an undercapitalized bank and in evaluating approvals would scrutinize whether a transaction would create increased credit, interest rate, liquidity, price, operational, compliance, strategic and reputation risk for the resulting bank.

The Policy Statement also states that the OCC is less likely to approve applications from acquirers who have experienced rapid growth or have engaged in multiple transactions with overlapping integration periods. Accordingly, if the Policy Statement is finalized in its current form, serial acquirers may need to justify why they do not pursue targets over a longer timeframe and document how they efficiently integrate targets to a greater degree.

3. Convenience and Needs

The Policy Statement would provide that the OCC takes a prospective view of a transaction's impact on the resulting institution's community in evaluating the convenience and needs factors. Though the agencies historically have relied principally on an applicant's Community Reinvestment Act ("CRA") record in evaluating this factor, and while the OCC would continue to consider an applicant's CRA record, the policy statement would make clear that while CRA is a useful indicator of an institution's past performance, convenience and needs would be a distinct analysis of the bank post-acquisition performed by the OCC as part of its merger evaluation.

Certain of the criteria that the OCC would consider under this factor, such as plans to close branches in low- or moderate-income areas, are generally consistent with current reviews. The Policy Statement goes further, however, stating that the OCC also would place increased emphasis on factors such as job losses or reduced job opportunities resulting from branch closures and consolidations. The emphasis on job losses would mark a shift from the OCC's previous decisions in which the OCC has stated that "the potential for job losses is not a factor the OCC statutorily considers in connection with [a merger] application,"¹² and from a position reaffirmed by the FRB as recently as 2022.¹³ Evaluation of employment ramifications would, however, be consistent with the merger guidelines recently finalized by the DOJ and Federal Trade Commission.

¹² OCC, CRA Decision 177 (Application for the merger of First Niagara Bank, National Association, Buffalo, New York into KeyBank National Association, Cleveland, Ohio) at 25 n. 25 (Sept. 16, 2016), available [here](#).

¹³ FRB, Order Approving the Acquisition of a Bank (U.S. Bancorp) at 17 n. 43 ("the potential for job losses resulting from a merger is outside of the limited statutory factors that the Board is authorized to consider when reviewing an application or notice under the BHC Act."), available [here](#).

More generally, the Policy Statement's expansive approach to evaluating the convenience and needs factor creates additional ambiguity for acquirers seeking to ensure that they satisfy standards for approval. In addition, and though not expressly indicated in the Policy Statement, this approach may enable the Consumer Financial Protection Bureau to play a larger, even if informal, role in merger reviews, a role that it has indicated it wished to have.¹⁴

4. Note on Competitive Factors

Though the Policy Statement does not address competitive factors in depth, Hsu said in his speech that the banking agencies and the DOJ continue to work on the framework for evaluating competitive factors in the context of bank mergers. He noted it was appropriate to revisit the existing 1995 DOJ and agency guidelines and “go beyond” the existing approach of using “retail deposits as a proxy for market power.”¹⁵ Interestingly, the Proposal explicitly states that the OCC's review of competitive factors is guided by the 1995 guidelines,¹⁶ but we assume that will be superseded if and when the new bank merger antitrust guidelines become available.

With respect to the potential content of the bank antitrust guidelines, Assistant Attorney General Jonathan Kanter outlined the DOJ's new approach to evaluating the Bank Merger Act competitive factors last summer.¹⁷ Among other things, Kanter indicated the DOJ would consider a broader range of competitive factors beyond deposit concentration in local markets and would take a more fact-specific view of bank merger applications. However, this framework has not been formalized, and while Hsu “agree[d] with Mr. Kanter's sentiment that it is imperative that we work together to formulate a new framework for assessing competition,” Hsu stopped short of endorsing any specific elements of Kanter's speech.

C. Public Comments and Public Meetings

The Policy Statement would provide that applications to the OCC under the Bank Merger Act are subject to a 30-day comment period, which may be extended if the bank applicant fails to file all publicly required information; the OCC determines, after a request, that additional time is needed to develop factual information necessary to consider the application; or when the OCC determines other extenuating circumstances exist. Extenuating circumstances include transactions in which public meetings are held

¹⁴ See Request for Information and Comment on Rules, Regulations, Guidance, and Statements of Policy Regarding Bank Merger Transactions, 87 Fed. Reg. 18740, 18744 (FDIC Request of Information advanced by CFPB Director asking “[t]o what extent should the CFPB be consulted by the FDIC when considering the convenience and needs factor and should that consultation be formalized?”).

¹⁵ Hsu Speech at 16.

¹⁶ 89 Fed. Reg. at 10012 n. 11.

¹⁷ See our blog on the DOJ's new approach, available [here](#).

(to allow for comments after the meetings), novel or complex transactions or when natural disasters affect the public's ability to submit comments.

In addition, the Policy Statement provides that the OCC may hold public meetings on a proposed merger after balancing the public's interest in the meeting against the value or harm to the decision-making process. In making this determination, the OCC would consider criteria such as the extent of the public interest, whether the resulting institution will have \$50 billion or more in assets, whether the acquirer and target are serving the convenience and needs of their communities, and the parties' CRA, consumer compliance and fair lending records, in addition to other supervisory records. Historically, public hearings have been reasonably rare, with the banking agencies generally believing the written comment process sufficient to raise public concerns. The Policy Statement could be read, consistent with earlier comments from Hsu,¹⁸ as making extended public comment periods and public hearings more likely, at least with larger bank proposals, which may raise concerns about timing, the cost of addressing issues raised in comments, and ultimate approval.

Among other things, this approach would make early outreach to community groups supportive of an acquiring bank and its proposed growth an even more critical part of the acquirer's and target's merger preparation process.

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¹⁸ Acting Comptroller of the Currency Michael J. Hsu, Bank Mergers and Industry Resilience (May 9, 2022) ("For example, for mergers involving larger banks, the OCC is considering adopting a presumption in favor of holding public meetings."), available [here](#).

Appendix A

Indicators that Are Consistent with Approval	Indicators Raising Supervisory / Regulatory Concerns
The acquirer is well capitalized and the resulting institution will be well capitalized.	
The resulting institution will have total assets less than \$50B.	The acquirer is GSIB, or subsidiary thereof.
The target’s combined total assets are less than or equal to 50% of acquirer’s total assets.	
The acquirer has a Community Reinvestment Act (“CRA”) rating of Outstanding or Satisfactory.	The acquirer has a CRA rating of Needs to Improve or Substantial Noncompliance.
The target is an eligible depository institution as defined in OCC regulations (which includes having a composite rating of 2 or better, a CRA rating of Satisfactory or better and a consumer compliance rating of 2 or better).	
The acquirer has composite and management ratings of 1 or 2 under the applicable rating system.	The acquirer has 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.

<p>The proposed transaction clearly would not have a significant adverse effect on competition.</p>	
<p>The acquirer has a consumer compliance rating of 1 or 2, if applicable.</p>	
<p>The acquirer has no open formal or informal enforcement actions.</p>	<p>The acquirer has open or pending Bank Secrecy Act/Anti-money Laundering enforcement or fair lending actions, including referrals or notifications to other agencies.</p> <p>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.</p>
<p>The acquirer has no open or pending fair lending actions, including referrals or notifications to other agencies.</p>	
<p>The acquirer is effective in combatting money laundering activities.</p>	
<p>The OCC has not identified a significant legal or policy issue.</p>	
<p>No adverse comment has raised a significant CRA or consumer compliance concern.</p>	

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Please do not hesitate to contact us with any questions.



Gregory V. Gooding
Partner, New York
+1 212 909 6870
ggooding@debevoise.com



Ted Hassi
Partner, Washington, D.C.
+1 202 383 8135
thassi@debevoise.com



Matthew E. Kaplan
Partner, New York
+1 212 909 7334
mekaplan@debevoise.com



Gregory J. Lyons
Partner, New York
+1 212 909 6566
gilyons@debevoise.com



Tejas N. Dave
Associate, New York
+1 212 909 6155
tndave@debevoise.com



Clare K. Lascelles
Associate, New York
+1 212 909 6628
cklascelles@debevoise.com



Alexandra N. Mogul
Associate, New York
+1 212 909 6444
anmogul@debevoise.com