Financial Services Management

Bank-Merger Policy

Cite
OCC, Notice of Proposed Rule and Policy Statement, Merger-Approval Process

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Website
https://www.occ.gov/news-issuances/news-releases/2024/nr-occc-2024-7a.pdf

Impact Assessment

- The OCC intends this policy and rule only to clarify bank-merger decision-making, but it would create additional areas of discretion along with presumptions that suggest protracted delay and more likely disapproval for all but the smallest, simplest deals unless larger ones are related to another bank's fragility or broader systemic threat.
- The OCC says the policy will not affect small-bank mergers, but it seems likely to do so given the end of a presumption of approval and additional merge-disapproval concerns.
- There is no impact assessment for larger transactions in the proposal.
- Even a small deal not involving another IDI would be at best a challenge for large national banks and GSIBs. This may hinder innovation via acquisition of outside expertise or technology capability, but also constrain the network effects that may trouble the OCC in light of recent Biden Administration antitrust policy.
- Nonbanks/nonbank M&A unrelated to banks will be unaffected, increasing their market power. Some banks may consider converting from a national charter unless Fed and/or FDIC merger policy is similarly stringent.

Overview

Although all of the banking agencies have for years promised a new bank-merger policy, none has proposed one until this OCC rulemaking. It is intended to add certainty and transparency to the manner in which the OCC reviews merger applications or others for charter combinations from national banks and federal savings associations resulting in a federally-chartered depository, but the OCC retains discretion to do as it chooses in this arena given the flexibility built into all the attributes now laid out that may augur OCC disapproval and/or expedited processing. The policy also appears to apply to non-depository acquisitions despite the proposal's preamble suggesting the policy applies only to depositories. The presumption of approval even for simpler, smaller deals would be eliminated, creating at the least additional uncertainty in this arena. Further, broader uncertainty remains in the absence of policy guidance from the Federal Reserve regarding holding companies and the Department of Justice, which may overturn merger approvals the OCC decides to grant.

Impact

Although the OCC is an independent agency not bound by orders from the President, the proposal nonetheless reflects the President's 2021 executive order adopting a far more skeptical approach to mergers than was traditionally the case.[1] This new Administration approach led to June 2023 statements from a key Justice Department official about a new bank-merger construct along with a sweeping antitrust-policy rewrite from Justice and the Federal Trade Commission.[2] Reflecting this, the new OCC policy would eliminate the current presumption of merger approval for what are now considered business combinations eligible for streamlined approval, ending both special treatment for business combinations versus any charter conversion as well as the existing streamlined process. Instead, all combinations that trigger the concerns iterated in the policy statement (see below) would be subject to full review under an indefinite timeline. The extent to which the OCC's objective – greater transparency – would be realized in practice is highly uncertain and many more combinations may be abandoned due to uncertainty or face lengthy review ultimately ending in disapproval.

This is most clearly the case for larger transactions. One of the express disapproval standards is that an acquirer is a GSIB or subsidiary of a GSIB, presumably regardless of whether the banking organization is so designated by the Federal Reserve or its home country. The policy statement also defines risks to financial stability that may lead to merger disapproval for acquirers or transactions that could trigger any one of the GSIB-designation criteria, even if the banking organization is not itself a GSIB. This would extend this merger-disapproval construct to larger banking organizations.

As a result, it would likely prove a significant obstacle to M&A of all kinds for larger regional banks despite the pressures of pending rules that may force consolidation to achieve vital economies of scale or scope. Regional-bank acquisitions are still possible if the acquirer or resulting entity does not touch any GSIB triggers or in an emergency, but the cost of such transactions to the FDIC and any subsequent pass-through via special assessments to the industry might be averted if more orderly M&A is allowed.

The OCC's policy would also apply to and often bar combinations not already barred by the Dodd-Frank Act's prohibition on controlling more than ten percent of U.S. deposits unless these are acquired organically or in an emergency acquisition such as JP Morgan's acquisition last year of First Republic.[3] GSIBs would be generally barred from mergers even if their deposit share is small and they seek another depository institution in the U.S. or, perhaps, abroad or if they seek what would generally be considered a niche nonbank entity that expands the bank's footprint in a non-depository financial arena or results in additional

[1] See *Client Report* **MERGER6**, July 9, 2021.

[2] See **MERGER13**, *Financial Services Management*, December 27, 2023.

[3] See **FHC19**, *Financial Services Management*, July 29, 2010.

technological expertise. This stand is consistent with the new DOJ/FTC policy referenced above.

Among other things, it would create significant hurdles for any acquisition that might be deemed to give an acquirer undue market power by way of additional shares of a particular activity even if the activity is not material to the market power of the acquiring entity as a whole. This results from policy distrust of market power gained from network effects and/or control over critical information such as patents that then impede competition. If the OCC follows suit as it proposes, then nationally-chartered banks affiliated with GSIBs or even large regional banks with at least one GSIB attribute would be essentially frozen in place when it comes not only to retail banking, but also across an array of other arenas in which nonbanks that a GSIB might wish to target plan an ever more powerful market role. This would enhance nonbank power as long as nonbank mergers do not run afoul of the Department of Justice or FTC.

Despite the scope of these revisions, the impact analysis in the proposal says that the OCC does not expect it to have different merger outcomes for affected small institutions than would be the case under current standards. It bases this conclusion on the agency's assertion that the new policy is principally designed to enhance transparency, not increase the amount of information filers would need to submit or change approval criteria. The changes to the streamlined process are also said not to have meaningfully different outcomes than current procedures because the information to be filed is largely the same. However, the criteria by which even small transactions will be judged is clearly different than OCC practice in prior years, for example now by viewing rapid growth or multiple acquisitions as disapproval criteria even though many deals have been approved in recent years despite these characteristics (e.g., Silicon Valley Bank). The proposal is not accompanied by any impact analysis for larger transactions or more complex ones where application outcomes would likely be significantly different than OCC policy in recent years.

Finally, the lack of like-kind FRB or FDIC policy makes the competitive implications of this proposal applicable only to national banks and federal savings associations. Given the importance some ascribe to regional-bank consolidation as an urgent strategic imperative, some federally-chartered entities may consider charter conversion and use any state-chartered banks as acquisition parent companies if possible.

What's Next

This NPR and its policy statement were released on January 29; comments are due sixty days after *Federal Register* publication.

Federal Financial Analytics, Inc.
2101 L Street, N.W., Suite 300, Washington, D.C. 20037
Phone: (202) 589-0880
E-mail: info@fedfin.com Website: www.fedfin.com

Analysis

I. Policy Statement

A. Merger Criteria

1. Approval

Features of a merger "generally consistent" with approval would include:

- the acquirer and resulting institution are well capitalized;
- the resulting institution will have assets less than $50 billion;
- the acquirer's CRA rating is outstanding or satisfactory;
- the acquirer has a composite and management CAMELS rating of 1 or 2;
- the acquirer has a consumer-compliance rating of 1 or 2, where applicable;
- the acquirer has no open enforcement or fair-lending actions;
- the acquirer "effectively" combats money laundering;
- the target's assets are equal or less than fifty percent of those of the acquirer and it is an eligible depository institution;
- there is no clear, "significant" adverse impact on competition;
- the OCC has not identified any "significant" legal or "policy" issues; and
- comment has not raised significant CRA or consumer concerns.

2. Disapproval Conditions

Unless remediated, these would be ratings or other performance factors that do not meet those noted above related to likely approval. In addition, the OCC would disapprove a merger if:

- the acquirer is not financially sound or well-managed. This would presumably be an OCC finding independent of the CAMELs ratings noted above;
- the acquirer is a GSIB or subsidiary of a GSIB; or
- there have been numerous enforcement actions over the prior three years against the acquirer regardless of whether any is outstanding.

3. Financial Stability

In addition to the criteria noted above, the OCC's policy lays out how the agency will consider financial-stability implications as required by law. The method would essentially subject a transaction to many of the criteria used to designate GSIBs (e.g., size, substitutability, contagion risk, complexity, cross-border exposures).[4] Since the disapproval criteria already create a presumption that GSIB deals will be denied, this approach appears intended to clarify that acquirers or resulting entities that transgress one or more systemic-designation criteria but do not score highly enough to be designated GSIBs under the Fed's pending rewrite would still face significant obstacles consummating a merger.[5]

Challenges resolving the combined entity would also be considered a threat to financial stability, with this judged based on performance under the resolution standards proposed by the FRB and FDIC.[6]

However, the new policy would include a "balancing test" weighing the systemic risk of approving a transaction with that resulting from disapproval, especially when one transaction participant is a "troubled" entity. Each systemic factor and the combined entity's resolvability will be considered singly and in combination, with any one factor sufficient to warrant disapproval. Alternatively, any beneficial factor might warrant approval along with a determination that additional prudential standards suffice to contain added risk. Conditional approval is also possible.

4. Concurrent Filings

The OCC may also disapprove of an application based on what are called "concurrent filings." These are likely most importantly filings before the Federal Reserve with regard to a holding-company combination, where the OCC is likely to assess the risks a new parent may pose to the resulting federal charter.

5. Financial and Managerial Resources

These must also be considered under the Bank Merger Act, which also requires consideration of the prospects for the combined institution. The OCC states that it considers each of these issues based on criteria detailed in the policy statement on its own and in a "holistic" context, looking again at several of the factors used to assess financial stability along with the company's supervisory record, any recent rapid growth, recent multiple acquisitions with overlapping integrations, or where the transaction is essentially a reverse acquisition. The OCC would also consider the extent to which the acquirer's due diligence suffices to anticipate problems with the target and integration challenges, taking into account governance capabilities at the bank and parent holding company along with the two

[4] See **GSIB7**, *Financial Services Management*, July 23, 2015.

[5] See **GSIB22**, *Financial Services Management*, August 22, 2023.

[6] See **RESOLVE48**, *Financial Services Management*, October 21, 2022.

corporate cultures. An application may be rejected or conditioned on performance targets if the OCC believes there may be significant integration and information-security weaknesses in the combined company.

6. Convenience and Needs

This is another statutory approval criterion that will now be evaluated on factors such as possible branch closings, LMI-community impact, and overall credit availability, with job losses at the bank or community now also to be taken into consideration. These reviews are separate from those germane to CRA ratings. Comments on a proposed transaction would continue to be taken into account, with the usual thirty-day comment period extended if the applicant has not provided necessary information or seeks confidential treatment for portions germane to public comment, the filer does not respond to OCC requests related to comments, or the OCC decides it is appropriate based on the need for additional information or other "extenuating" circumstances.

B. Public Hearings

The OCC plans to balance public interest in a transaction with the agency's views that it would "harm" the decision-making process. How harm might occur is not made clear, but the criteria judging public interest are matters such as transaction size or the applicant's CRA record.

II. Revised Regulation

There is currently a streamlined process now available for business combinations where the resulting institution will be well-capitalized immediately after transaction consummation, and the transaction's target is less than fifty percent of the acquirer, and certain other thresholds are met. This would be discontinued, with the OCC also according itself considerable flexibility to extend decision timelines.