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Acting Comptroller of the Currency Announces Proposed Rulemaking Regarding Bank Mergers

Proposed Rule to Eliminate the Availability of Automatic Expedited Approvals and Streamlined Applications for Bank Mergers

SUMMARY

On January 29, 2024, Acting Comptroller of the Currency Michael Hsu spoke at the University of Michigan Stephen M. Ross School of Business on "What Should the U.S. Banking System Look Like? Diverse, Dynamic, and Balanced" (the "Remarks," available here). The Remarks call for the development of a "macro view" of the banking system—one that holistically evaluates the impact of bank mergers on the banking system and the U.S. economy—as a way to improve "transparency and trust" in the Office of the Comptroller's (the "OCC") "micro," case-by-case approach to reviewing bank merger applications.

In furtherance of that objective, Acting Comptroller Hsu announced that the OCC is releasing today a notice of proposed rulemaking (the "NPR," available here) inviting comment on a proposal to amend its regulations governing business combination applications to remove (i) provisions related to the expedited review and "deemed approval" of such applications in certain circumstances and (ii) the availability of a streamlined application for these types of transactions. Importantly, the NPR seeks comment on a draft policy statement summarizing the principles the OCC uses when reviewing proposed bank mergers, which could be read as differing in certain critical respects from current policy and practice. These principles would be added to the OCC's business combinations regulation as an appendix.

Comments on the NPR will be due 60 days after publication in the Federal Register.

BACKGROUND

The Remarks and the NPR come against the background of a reexamination of bank merger policy among the Biden administration and certain bank regulatory agencies over the past two years. In July 2021, President Biden issued an Executive Order on Promoting Competition in the American Economy (available here), urging, among other things, a "revitalization of merger oversight under the Bank Merger Act and the Bank Holding Company Act of 1956." In accordance with that directive, (i) in December 2021 the U.S. Department of Justice's Antitrust Division (the "DOJ") announced that it was seeking public comment on "whether and how the division should revise the 1995 Bank Merger Competitive Review Guidelines," which explain the analytical framework that guides the competition review of bank mergers,[1] and (ii) in March 2022 the Federal Deposit Insurance Corporation (the "FDIC") requested information on a wide range of issues relating to bank merger transactions.[2]

Since 2022, the OCC has similarly signaled that it is in favor of revisiting its approach to bank merger applications and its review process for such transactions, and is actively working with the FDIC, the DOJ and the Federal Reserve on updates to the analytical framework related to these transactions. For example, in May 2022, Acting Comptroller Hsu gave a speech at the Brookings Institute (available here) during which he noted that "the frameworks for analyzing bank mergers need updating" because "[w]ithout enhancements, there is an increased risk of approving mergers that diminish competition, hurt communities, or present systemic risks." In addition, in February 2023 Senior Deputy Comptroller and Chief Counsel Ben W. McDonough delivered opening remarks for the OCC Bank Merger Symposium on behalf of Mr. Hsu (available here) during which he reiterated the Acting Comptroller's views that "[the OCC] needs to build a better mousetrap so that healthy mergers get approved while unhealthy mergers get rejected," and to do so the OCC needs to revise its analytical framework to deepen its evaluation of a bank merger's effect on market concentration, financial stability and the convenience and needs of the communities served.

PROPOSED RULE

Today, the OCC took an initial step toward updating that framework by issuing an NPR that seeks comment on (i) proposed amendments to the OCC's regulations to eliminate expedited review and the use of streamlined applications currently available for certain bank mergers, and (ii) the addition of a policy statement to clarify the standards the OCC will apply in reviewing business combinations involving national banks and federal savings associations.

- ***Regulatory Amendments.*** The NPR outlines two substantive changes to the OCC's business combination regulation, 12 CFR § 5.33. First, the OCC proposes to remove the automatic expedited review and approval procedures that permit a transaction that qualifies as a business reorganization[3] or a streamlined application[4] to be deemed approved as of the 15th day after the comment period on the application closes, unless the OCC extends the review period or otherwise notifies the applicant that its filing is not eligible for expedited review.[5] The OCC notes that it considers "*any* business combination subject to a filing under § 5.33 [to be] a significant corporate transaction requiring OCC decisioning, which should not be deemed approved solely due to the

passage of time."[6] Second, the OCC would also eliminate the aforementioned streamlined application provisions because the "fuller record provided through the Interagency Bank Merger Act Application provides the appropriate basis for the OCC to review a business combination application."[7]

The OCC notes in commentary that it does not expect these regulatory amendments to significantly increase the burden on applicants that would have otherwise qualified for the expedited procedures and use of a streamlined application because, in accordance with its proposed policy statement, the OCC will consider these transactions as possessing "indicators that are likely to satisfy statutory factors and do not otherwise raise supervisory or regulatory concerns" and may "use its discretion to reduce the information that the applicant needs to provide to the OCC" in such circumstances.[8]

- ***Policy Statement.*** The NPR also contains a proposed policy statement that would be added as a new appendix A to Part 5 of the OCC's regulations. The addition of the policy statement is driven in part by the OCC's determination that the *Comptroller's Licensing Manual* does not adequately describe "all of the OCC's considerations regarding the BMA statutory factors and its related processes such as considerations for holding public meetings."[9] The policy statement: (i) outlines the "features of applications or indicators that are generally consistent with OCC approval under the Bank Merger Act, as well as the features and indicators that raise supervisory or regulatory concerns and may be inconsistent with OCC approval"; and (ii) clarifies the OCC's "decision process for extending the public comment period or holding a public meeting." Observing that merger applications "exist along a spectrum" where "some have significant deficiencies" and others are "straightforward because the acquiring bank is a model of safety and soundness and has earned the trust of the community and its supervisors," Acting Comptroller Hsu argued that the "majority lie somewhere in between and require varying degrees of scrutiny and multiple rounds of inquiry," and said the policy statement "effectively proposes chalk lines demarcating these three groups."

  Specifically, the proposed policy statement has the following five substantive sections:

  - **Section II (General Principles of OCC Review):** Provides information about how the OCC considers the BMA statutory factors of financial stability, financial and managerial resources, and convenience and needs of the community and notes certain applicant and transaction features that, in the OCC's experience, are consistent with an application approval. These include the following, among other indicators: (i) the acquirer is "well-capitalized" and the resulting institution will be "well-capitalized"; (ii) the acquirer has a Community Reinvestment Act (the "CRA") rating of Outstanding or Satisfactory; (iii) the resulting institution will have total assets of less than $50 billion; (iv) the acquirer has composite, management and consumer compliance ratings of 1 or 2; and (v) the acquirer has no open formal or informal enforcement actions.

    Conversely, the OCC indicates that the following indicators, among others, would raise supervisory or regulatory concerns consistent with application denials on the basis of the statutory factors not being met: (i) the acquirer as a CRA rating of Needs to Improve or Substantial Noncompliance; (ii) the acquirer has composite, management and consumer compliance ratings of 3 or worse; (iii) the acquirer is a global systemically important banking ("GSIB") organization or subsidiary thereof; or (iv) the acquirer has open or pending Bank Secrecy Act or anti-money laundering enforcement or fair lending actions.[10]

  - **Section III (Financial Stability):** States that in evaluating the financial stability factor, the OCC considers, among other factors, whether a proposed transaction would: (i) materially increase risk to financial system stability due to an increase in size of the combining institutions; (ii) result in a reduction in the availability of substitute providers for the services offered by the resulting institution; and (iii) increase the relative degree

of difficulty of resolving or winding up the resulting institution's business in the event of a failure or insolvency.[11] In addition, the OCC applies a balancing test and "weighs the financial stability risk of approving the proposed transaction against the financial stability risk in denying the proposed transaction, *particularly if the proposed transaction involves a troubled target*."[12]

- **Section IV (Financial and Managerial Resources and Future Prospects):** Describes how the OCC tailors its assessment of these statutory factors based on the size, complexity and risk profile of the parties to the transaction (on an individual and combined basis), and indicates that the OCC is more likely to deny applications where, among other things, an acquirer: (i) has experienced rapid growth; (ii) is the functional target in the transaction; or (iii) has engaged in multiple acquisitions with overlapping integration periods."[13]

- **Section V (Convenience and Needs):** Explains how the OCC will closely scrutinize an acquirer's plans with respect to communities served by the combined institution, including with respect to the: (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.[14] In addition, the OCC states that its consideration of an applicant's CRA record of performance is "separate and distinct" from its evaluation of the convenience and needs statutory factor.[15]

- **Section VI (Public Comments and Meetings)**: Articulates the circumstances under which the OCC may extend the comment period on a bank merger application beyond the standard 30-day period, including when a filer fails to provide all required publicly available information on a timely basis or in extenuating circumstances involving novel or complex transactions or transactions in which public meetings are held to allow for public comment after the meeting. Regarding this last point, this section also provides information regarding the criteria informing the OCC's decision on whether to hold a public meeting with respect to a particular transaction, which include, among other factors: (i) the extent of public interest in the proposed transaction; (ii) whether a meeting is appropriate to address issues the public raises during the public comment process; and (iii) the significance of the transaction to the banking industry (analyzed partly by reference to the asset sizes of the institutions involved and concentration of the resulting institution in one or more markets).[16]

- ***Implications.*** Although many of the OCC's stated principles in the NPR are unremarkable in that they are consistent with current regulatory policy and practice on bank merger applications, certain of the specific proposals set forth in the NPR could be interpreted to represent a major reversal of certain existing policies. These reversals could chill merger activity until there is a final rule. They include:

  1) Transactions involving a combined institution with less than $50 billion in assets are regarded as consistent with approval, which could be read as creating a negative implication as to acquisitions of a larger size;

  2) Transactions involving a target that is less than 50% of the acquirer are regarded as consistent with approval, which could be viewed as creating a negative implication for mergers of equals; and

  3) The OCC is "unlikely to find that the statutory factors under the Bank Merger Act are consistent with approval … [if t]he acquirer is a [GSIB], or subsidiary thereof,"[17] which may be considered to contravene past approval practice.[18]

ANALYSIS

Although in his Remarks Mr. Hsu suggests the aim of the OCC is to provide institutions and the public with greater transparency and clarity regarding how the OCC reviews bank merger applications, the proposals set forth in the NPR could be considered a significant departure from the OCC's long-standing approach to evaluating and processing these applications, which may create uncertainty for market participants and potentially discourages them from pursuing "healthy mergers" that are beneficial from financial stability, competition, and community convenience and needs perspectives and that, under a "macro view," would drive the innovation and economies of scale required to positively impact the U.S. banking system and in turn the U.S. economy.

Apart from these principles, the NPR does not seem to address the lengthy period of time which has been required for bank merger approvals by all the agencies and how the concept of approval deadlines is consistent with the statutes governing bank mergers. Additionally, certain of the proposals, such as requiring a full Interagency Bank Merger Application for internal reorganizations or proposed transactions that are subject to Federal Reserve review, may result in duplicative review processes among the federal banking agencies, particularly in scenarios where the OCC has the ability to comment on an application pending with another agency.

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ENDNOTES

[1] Although the DOJ has not yet issued any proposed revisions to the Bank Merger Competitive Review Guidelines, in July 2023 the DOJ and the Federal Trade Commission ("the FTC") issued draft merger guidelines (available here) for public comment that articulated a policy more adverse to mergers than their prior long-standing policy. In December 2023, the DOJ and the FTC adopted final merger guidelines that largely tracked the draft merger guidelines despite many commenters having criticized the draft merger guidelines. *See* our prior memorandum to clients regarding the final merger guidelines here.

[2] *See* our prior memorandum to clients regarding the FDIC's RFI on bank merger transactions here.

[3] § 5.33(d)(3) defines a "business reorganization" as either a business combination between (i) eligible banks and eligible savings associations, or between an eligible bank or an eligible savings association and an eligible depository institution, that are controlled by the same holding company or that will be controlled by the same holding company prior to the combination; or (ii) an eligible bank or an eligible savings association and an interim national bank or interim Federal savings association chartered in a transaction in which a person or group of persons exchanges its shares of the eligible bank or eligible savings association for shares of a newly formed holding company and receives after the transaction substantially the same proportional share interest in the holding company as it held in the eligible bank or eligible savings association (except for changes in interests resulting from the exercise of dissenters' rights), and the reorganization involves no other transactions involving the bank or savings association.

[4] § 5.33(j) 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% 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% 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.

ENDNOTES (CONTINUED)

5 *See* NPR at 6.

6 *Id.* (emphasis added).

7 *Id.* at 7.

8 NPR at 6, 8.

9 *Id.* at 5.

10 *Id.* at 26–28.

11 *Id.* at 29.

12 *Id.* at 11, 29 (emphasis added). We note that this is a departure from prior OCC bank merger review practice.

13 *Id.* at 32.

14 *Id.* at 38.

15 *Id.*

16 *Id.* at 40.

17 *Id.* at 27.

18 *See*, *e.g.*, OCC Order Approving JPMorgan Chase Bank, National Association's acquisition of the substantial majority of First Republic Bank's assets (May 1, 2023) (available here).

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