

# OCC Issues Notice of Proposed Rulemaking on Business Combinations

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The Office of the Comptroller of the Currency (“**OCC**”) recently sought comment on a proposed rule designed to increase the transparency of the standards applicable to the OCC’s review of business combinations (i.e., bank mergers, consolidations or the assumption of deposits) involving national banks and federal savings associations (the “**NPRM**”). At a high level, the NPRM would amend two provisions of the OCC’s rules for business combinations set forth in 12 CFR 5.33 and add as an appendix to 12 CFR 5, subpart C, a policy statement summarizing the principles the OCC considers when reviewing bank merger transactions under the Bank Merger Act (“**BMA**”), including the OCC’s consideration of the following factors: (i) financial stability, (ii) financial and managerial resources and future prospects and (iii) convenience and needs (the “**Policy Statement**”). The amendments would apply to all national banks, federal savings associations and federal branches and agencies of foreign banks, while the Policy Statement would be applicable to insured national banks, federal savings associations and federal branches of foreign banks. A brief summary of the NPRM is provided below.

- **Amendments: Removal of Provisions Related to Expedited Review.** The NPRM would remove the expedited review procedures currently set forth in 12 CFR 5.33(i), which, as currently written, provide that a filing qualifying as a “business reorganization” or “streamlined application” is deemed approved as of the 45th day after the OCC receives such filing, or the 15th day after the close of the comment period, whichever is later, unless the OCC notifies the applicant otherwise before such deadline. In addition, the NPRM does away with the OCC’s streamlined business combination application, currently allowed for under 12 CFR 5.33(j), and requires the filing of the Interagency Bank Merger Act Application for all applicants. The OCC believes the NPRM’s removal of these provisions reflects the OCC’s opinion that business combinations subject to filing requirements are inherently significant transactions deserving of substantive agency review and should not be passively approved merely as a result of the passage of time.
- **Policy Statement: General Principles.** The Policy Statement states that the following are general principles that would steer its business combination review process:
  - The OCC’s desire to act promptly on all applications;
  - Certain indicators that applications are consistent with agency approval, such as (i) attributes regarding an acquirer’s financial condition and size, (ii) an acquirer’s management, compliance and Community Reinvestment Act (“**CRA**”) ratings, (iii) effectiveness of an acquirer’s Bank Secrecy Act/anti-money laundering (“**BSA/AML**”) program, (iv) absence of fair lending concerns as they relate to an acquirer, (v) attributes regarding a target’s size and ratings, (vi) no significant anticompetitive effects and (vii) no material concerns related to CRA or consumer compliance; and
  - Certain indicators that, if present in applications, would raise supervisory concerns, such as (i) an acquirer having a CRA rating of “Needs to Improve” or “Substantial Noncompliance,” (ii) an acquirer having compliance or management ratings at or under “3,” (iii) an acquirer being, or being a subsidiary of, a global systemically important banking organization, (iv) an acquirer having open or pending BSA/AML enforcement actions, (v) an acquirer having open or pending fair lending actions and (vi) an acquirer having failed to adhere to corrective actions required by a formal enforcement action.

- **Policy Statement: Financial Stability.** The Policy Statement would also address the ways in which the OCC evaluates risk to the stability of the U.S. banking and/or financial system. Notably, it provides more detail on the balancing test applied by the OCC when considering this factor and clarifies the additional considerations the OCC would take into account, such as the OCC’s consideration of the following:
  - Whether a business combination would provide any stability advantages;
  - Whether strengthened prudential standards may offset potential risks; and
  - The effect of a business combination on a resulting institution’s recovery planning standards.

- **Policy Statement: Financial and Managerial Resources and Future Prospects.** The Policy Statement would provide additional detail on the considerations regarding the combining and resulting institutions’ (i) financial resources, (ii) managerial resources and (iii) future prospects.

The Policy Statement lists the following “financial resources” factors:

- The agency’s evaluation of pro forma capital levels;
- The general statutory prohibition on approving applications involving “undercapitalized” applicants;
- The close scrutiny to be applied to business combinations that increase risk to banks’ financial conditions and resilience levels; and
- The agency’s assessment of management’s ability to address increased risks.

The Policy Statement lists the following “managerial resource” factors:

- Both entities’ supervisory record and current condition;
- Both entities’ (i) management ratings under either the Uniform Financial Institutions Rating System or the risk management, operational controls, compliance and asset quality system and (ii) component ratings under the Uniform Interagency Consumer Compliance Rating System, Uniform Rating System for Information Technology and/or Uniform Interagency Trust Rating System;
- Risk Assessment System conclusions for applicants and OCC-supervised target entities;
- The due diligence conducted by an acquirer of a target entity’s business model, systems compatibility and weaknesses (e.g., identification of overdependence on “manual controls, strategies for automating critical processes, and capacity and moderation of aging and legacy information technology systems”);
- An acquirer’s ability and plan to address (i) previously identified weaknesses of a target entity and (ii) systems compatibility and integration issues;
- An acquirer’s demonstrated history of integrating combining entities’ operations; and
- The governing structure of a resulting institution contextualized within its relationship with its holding company and such holding company’s activities (e.g., decision-making processes, board oversight structure, risk management system, etc.).

The Policy Statement also lists the following “future prospects” factors:

- The proposed operations of a resulting institution;
- Whether an integrated institution will have the ability to function as a single entity in a safe, sound and effective manner; and
- A business combination’s effects on a resulting institution’s operational resilience and/or continuity planning.

- **Policy Statement: Convenience and Needs.** The Policy Statement would clarify the agency’s assessment of the likely effects of a business combination on the community to be served (i.e., the convenience and needs factor).

The Policy Statement would describe the elements that factor into the OCC’s analysis, and such elements would be as follows:

- Changes to services, products and/or credit availability offered in low- and moderate-income communities;
- Projected changes to branch footprint and/or branching services;
- Potential branch-related job losses and/or opportunities; and
- Community development initiatives (e.g., affordable housing and small businesses).
- This section of the Policy Statement would also clarify that the OCC’s prospective consideration of the convenience and needs factor required under the BMA would be separate and apart from the OCC’s consideration of an applicant’s CRA record.

Comments on any aspect of the NPRM (available [here](#)) are encouraged and must be received by the OCC on or before April 15, 2024. Specifically, the OCC invites respondents to provide comment on:

1. Potential administrative burdens the NPRM would generate for depository institutions and/or customers of depository institutions; and
2. Potential benefits of the NPRM that should be considered in determining its effective date and administrative compliance requirements.

If you have questions about the contents of this bulletin, please contact **Daniel C. McKay** at [dmckay@vedderprice.com](mailto:dmckay@vedderprice.com), **James W. Morrissey** at [jmorrissey@vedderprice.com](mailto:jmorrissey@vedderprice.com), **Jennifer Durham King** at [jking@vedderprice.com](mailto:jking@vedderprice.com), **Mark C. Svalina** at [msvalina@vedderprice.com](mailto:msvalina@vedderprice.com), **Nicholas S. Zlevor** at [nzlevor@vedderprice.com](mailto:nzlevor@vedderprice.com), **Kelly L. Miller** at [klmiller@vedderprice.com](mailto:klmiller@vedderprice.com) or any other Vedder Price attorney with whom you have worked.

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