June 14, 2024

Proposed rule on "Business Combinations Under the Bank Merger Act"
c/o Chief Counsel's Office
Office of the Comptroller of the Currency
400 7th Street NW, Suite 3E-218
Washington, DC, 20219

Re: Proposed rule on "Business Combinations Under the Bank Merger Act"

Docket ID OCC-2023-0017 or RIN 1557-AF24

Dear Acting Comptroller Hsu,

I appreciate this opportunity to respond to the Office of the Comptroller of the Currency's (the "Agency") Notice of Proposed Rulemaking seeking information from financial institutions, consumer groups, and the public regarding its proposed rule changes to business combinations under the Bank Merger Act.

Background

As explained by the Agency, "The Bank Merger Act (BMA), section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)), and the OCC's implementing regulation, 12 CFR 5.33, govern the OCC's review of business combinations of national banks and Federal savings associations with other insured depository institutions (institutions) that result in a national bank or Federal savings association." The BMA forbids the OCC from approving mergers and acquisitions (M&As) resulting in a monopoly. The OCC may also not approve an M&A if such a combination would "substantially lessen" competition in any section of the country, "tend" to create a monopoly, or create a restraint in trade unless in the public interest by meeting the convenience and needs of the community to be served.[1] In determining whether to approve a transaction, BMA requires the OCC to consider the following factors: the financial and managerial resources and future prospects of the existing and proposed institutions, the convenience and needs of the community to be served, the risk to the stability of the United States banking or financial system, and the effectiveness of any insured depository institution involved in the proposed merger transaction in combatting money laundering activities, including in overseas branches.[2] Under existing regulations, national banks and savings associations seeking to combine must obtain approval from OCC.[3] Certain transactions are also eligible for streamlined application

[1] 12 USC 1828 (c)(5)(B).
[2] 12 U.S.C. 1828(c)(5), (11).
[3] 12 CFR 5.33(c).

and expedited review unless the OCC determines ineligibility for expedited review or guidelines for a review extension are followed.[4]

Under the proposed rule, the Agency seeks to do the following:

(1) Removing the expedited M&A review procedures under 12 CFR 5.33.
(2) Removing the streamlined business combination application under 12 CFR 5.33(j).
(3) Adding factors for review under a proposed Appendix A to 12 CFR 5.33.

These changes introduce extra-statutory hurdles that threaten to subject vital business decisions to the whims of federal bureaucrats under the guise of increasing "transparency" around the process. These changes by the OCC contradict the goal of providing businesses with more clarity and will result in delayed mergers that could take multiple years to complete, and are likely to chill merger activity altogether as parties will be unwilling to risk an even less predictable process.

I. The Agency arbitrarily and capriciously removes expedited M&A review provisions.

The Agency arbitrarily and capriciously seeks to fully remove the expedited M&A review processes. The Agency uses the need for "OCC decisioning" to completely scuttle the expedited review provisions—despite the fact the instances permitting such expedited review are carefully circumscribed only to transactions meeting the strict parameters of business reorganizations (under CFR 5.33(d)(3)) or those qualified for streamlined business combinations. These expedited review requirements are limited to those transactions possessing indicators that likely satisfy statutory factors and thus do not raise the supervisory or regulatory concerns intended to be addressed by BMA. The agency claims that "principles" governing this rationale will "continue to guide OCC processing of business combination applications." The proposed change would privilege the Agency's need for more time for decision over the public's need for timely adjudication—but without giving a single reason why the Agency's need should prevail in this class of cases, which are highly likely to satisfy statutory factors.

[4] 12 CFR 5.33(i) currently provides that a filing that qualifies as a business reorganization as defined in paragraph (d)(3) or that qualifies as a streamlined application under paragraph (j) is deemed approved as of the 15th day after the close of the comment period, unless the OCC notifies the applicant that the filing is not eligible for expedited review, or the expedited review process is extended, under § 5.13(a)(2).

II. The Agency arbitrarily and capriciously removes the streamlined business combination application.

Existing regulations under 12 CFR 5.33(j) specify limited instances based on minimum capitalization and maximum market concentration metrics in which an applicant can obtain OCC approval for a merger through streamlined business combination application. A filing that qualifies as a business reorganization or that qualifies as a streamlined application under paragraph is deemed approved as of the 15th day after the close of the comment period, unless the OCC notifies the applicant that the filing is not eligible for expedited review, or the expedited review process is extended.[6] This expedited process is an alternative to the far more detailed information requirements under Interagency Bank Merger Act (BMA). Although the series of questions on both applications are identical, the streamlined business combination application only requires detailed answers to questions answered in the affirmative by the applicant.

The OCC arbitrarily and capriciously proposes to remove the expedited review procedures. By default, all M&A applicants will be required to provide extensive information related to these factors as part of a much longer list contained in the Agency's proposed appendix A. Under the proposed rule, limitations on information provided will be at the OCC's discretion. The proposed rule grants discretion—in place of the current expedited, streamlined provisions-- for the Agency to "adopt materially different procedures for a particular filing, or class of filings as it deems necessary."[5] This discretion may be applied in "exceptional" or "for unusual" transactions. The discretionary streamlined process in these very limited circumstances only at the discretion of the Agency is the inverse of the present process that allows a streamlined process so long as a transaction falls within one of the four combination categories. Exceptions will be granted far less frequently than the current streamlined application provides.

The current streamlined process ensures that mergers meet the BMA's intent of "well-capitalized" entities. The Agency arbitrarily and capriciously jettisons this streamlined application process, simply claiming—but without demonstrating--that the "fuller record" of the default application is the "appropriate basis" for OCC merger review. Nor does the Agency demonstrate that the benefit of full responses outweigh the burden on the public of offering full responses or of the loss of certainty from rendering the streamlined process purely discretionary.

III. The Agency unreasonably uses "mitigation of financial stability risk" as reason for jettisoning the expedited review and streamlined business combination processes.

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[5] 12 CFR 5.2(b).

At the heart of the issue is an inaccurate portrayal and misunderstanding of the banking sector. Contrary to conventional wisdom, the banking sector is less consolidated than numerous other industries, including airlines and department stores. Regulations on bank mergers are more stringent than less regulated competitors like FinTechs. Moreover, the primary reason for concentration in finance is the ever-increasing regulatory burden. The regulatory burden rather than concentration is the problem. Recent studies also show that bank concentration is more nuanced than some policymakers make it seem. A study from the Federal Reserve Bank of Philadelphia shows that when considering the different products and services offered by banks, there is "no universal trend toward increasing concentration."[6] Furthermore, the U.S. has more banks per capita than other advanced economies like Canada and Australia.[7] Importantly, existing regulations already address concerns over concentration by broadly precluding OCC approval of an interstate M&A transaction resulting in the entity controlling more than 10 percent of total deposits of insured depository institutions in the United States.[8]

IV. The proposed rule disproportionately impacts smaller financial institutions

The Agency claims that removal of the streamlined business combination form "should not significantly increase the burden on applicants because information requested by the Interagency Bank Merger Act Application may be tailored as appropriate." However, this change introduces far more uncertainty and ambiguity into the application process by adding numerous, extra-statutory factors for review.[9] Because existing regulations already preclude approval for institutions that will control more than 10 percent of all insured deposits, the burden of this proposed rule falls on the myriad of smaller institutions beneath this threshold. The existing burden already places smaller institutions at a competitive disadvantage to their larger counterparts who enjoy lower compliance costs per customer, per employee, and per dollar of revenue.

The current proposals threaten to impede the efficiency gains from M&A that keep operating costs down. According to the Federal Reserve Bank of New York, smaller institutions incur higher costs in delivering banking services.[10] Banks pass along these costs to customers. As such, shareholders are not the only beneficiaries when two banks merge. Enhanced efficiency enables banks to diversify their services, provide consumers with a wider array of options, and increase their lending capacity.

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[6] Jim DiSalvo, *Banking Trends: Has the Banking Industry Become Too Concentrated?*, Federal Reserve Bank of Philadelphia,2023 Q1, https://www.philadelphiafed.org/-/media/frbp/assets/economy/articles/economic-insights/2023/q1/bt-has-the-banking-industry-become-too-concentrated.pdf.

[7] Satya Marar, "Blocking Mergers Won't Fix U.S. Banking," The Hill, August 29, 2023, https://thehill.com/opinion/finance/4176437-blocking-mergers-wont-fix-us-banking/.

[8] 12 USC 1828 (13)(A) and (B*).*

[9] Proposed Appendix A to 12 CFR 5.33.

[10] Anna Kovner, James Vickery, and Lily Zhou, *Do Big Banks Have Lower Operating Costs?, Federal Reserve Bank of New York, December 2014,* https://www.newyorkfed.org/medialibrary/media/research/epr/2014/1412kovn.pdf.

V. The proposed rule arbitrarily abandons the long-established consumer welfare standard related to antitrust.

In general, mergers create value both for shareholders and the public. One important factor of whether a merger with a large institution should be permitted is whether the merger meets the current standard concerning consumer welfare. The agencies appear to disregard this all-important analysis.

FDIC Chair Martin Gruenberg, Acting Comptroller Michael Hsu, and other regulators claim that these changes would increase transparency and help clear up the process for "good mergers." In reality, the proposal adds needless complexity to routine business dealings, discourages many "good mergers" from taking place, and leaves banks' investors and employees hanging in limbo during the drawn-out process.

Targeting mergers and acquisitions (M&As) is an especially misguided approach to addressing concerns around banking sector competition and stability. The long-term consequences of these proposals will ultimately impact consumers. M&A transactions allow larger, well-capitalized banks to acquire weaker banks. This strengthens the system's stability by merging weaker banks with stable ones. Especially in economic downturns, adding more uncertainty and time to this process will leave the entire financial system more vulnerable to individual bank failures—which can also undermine consumer welfare.

Expect an abundance of similar missed opportunities as federal agencies continue to multiply unclear and onerous regulations. In an environment where approvals aren't based on clear criteria and the odds of success are contingent on the political aspirations of the current regulators, more and more companies are already choosing to avoid the risk of engaging in M&A at all.

This directly threatens the health of America's small business community by depriving them of the capital they need to thrive. In a recent Goldman Sachs survey, nearly 80 percent of small business owners expressed concern about their ability to access capital. The proposals by the OCC and FDIC would only further weaken banks' ability to help communities across the country in dire need of investment.[11]

The fact that the FDIC and the OCC aren't even on the same page in developing a joint proposal threatens to increase the compliance costs of small entities even further. If any changes are necessary, the OCC and the FDIC should coordinate with one another, with the Federal Reserve Board, and the antitrust divisions of the Federal Trade Commission (FTC) and Department of Justice (DOJ) rather than act unilaterally.

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[11] "New Survey of Small Business Owners Shows a Credit Crunch is Hindering Growth," Goldman Sachs, October 25, 2023, https://www.goldmansachs.com/citizenship/10000-small-businesses/US/voices/news/oct-25-2023-press-release.html#:~:text=A%20new%20nationwide%20survey%20from,loan%20given%20current%20interest%20rates.

The agencies should withdraw these unnecessary, harmful proposals.

Sincerely,

Joel Griffith