Comparing the Agencies' Proposals to Change Bank Merger Reviews

Two of the three federal banking agencies, the Office of the Comptroller of the Currency ("OCC") and the Federal Deposit Insurance Corporation ("FDIC"), have recently issued proposed policy statements that would change in many ways how they review bank merger proposals under the Bank Merger Act ("BMA").

At a high level, the OCC proposal from January 2024 and FDIC proposal from March 2024 show that the current leadership of these banking agencies are, and have been, adopting a more skeptical view of bank mergers than in the past. The two policy statements, which purportedly are intended to clarify how these agencies will review BMA applications, will also in some ways make it more opaque, at least in the near term, as to what standards each agency will apply when reviewing an transaction.

Banks considering M&A in the current and emerging environment should consider the following takeaways:

- The OCC and FDIC appear to be raising the bar for the types of mergers that they will approve. These agencies may deny merger applications and/or impose burdensome conditions in their approval orders more frequently than in the past.

- Just how far the agencies are raising the bar has yet to be determined, and the policy statements' lack of clarity may chill merger activity until the agencies provide more specificity. For example, uncertainty around the FDIC's proposed approach to reviewing the competitive impact of a transaction increases the risk that an acquirer will need to make unplanned divestitures to secure regulatory approval, undermining acquirers' ability to know with certainty what assets and liabilities they will own following a transaction.

- More than ever, regulators want acquirers to make an affirmative showing that management can capably operate the combined institution safely and soundly and in a compliant manner and deliver benefits to a broader range of constituencies. Parties to a merger should expect to do more up-front integration planning and to provide more information to regulators as part of the application process. The cost of reaching every milestone in a transaction – signing, filing of regulatory applications, receipt of regulatory approvals, and closing – will increase, and we expect the pre-signing up front costs will increase the most because of the extra work acquirers will need to do in order to achieve more certainty around regulatory approval. So too will the parties' sunk costs if the regulators ultimately deny their applications.

- The new approach in Washington heightens the need for acquirers to discuss potential transactions with their supervisory teams well in advance of signing, to be thoughtful about structuring transactions and integration plans, and to consider what commitments they could make – or what conditions might be imposed on them – to secure regulatory approval.

- Several elements of the proposals may prove to be counterproductive to the agencies' broader goals. As one example, elements of the OCC proposal may make it harder for institutions in weaker supervisory condition to be acquired before they reach the point of failure, which could limit the regulators' options for resolving problem institutions and lead to more "zombie" banks with no exit strategy. As another example, the FDIC's proposal to issue a statement outlining its concerns with an application that is withdrawn may incentivize banks facing a denial to receive a denial order, which can be challenged in court, rather than withdraw. We expect strong industry pushback to these and other elements of the proposals during the public comment process.

In terms of comparing the OCC and FDIC proposals, they share several themes and features, as both proposals indicate that these agencies have grown concerned with size, rapid growth, integration and risk-management issues, branch closures and related job losses, and other reductions in service, and are considering holding public hearings on a broader range of transactions. At the same time, there are key differences between the OCC and FDIC proposals. These differences – as well as the fact that the Federal Reserve has not issued a similar proposal – show that the three federal banking agencies may ultimately take quite divergent approaches to evaluating merger applications. (Federal Reserve Vice Chair for Supervision Michael Barr recently stated that the Federal Reserve has no plans to release its own new bank merger policy but is working with the Department of Justice on updating the antitrust guidelines for bank mergers.)

To highlight the similarities and differences in the agencies' proposals, we have prepared the following chart that compares their notable provisions, grouped by subject matter.

OCC Proposal	FDIC Proposal
Competition/Antitrust Analysis	
No comparable provisions: would not address how the OCC will evaluate the competitive impact of a transaction	***More Holistic But Less Clear Standards.*** Would provide for a more nuanced review of the competitive effects of a transaction, but in the process, will eliminate the clarity that the current system provides (even if it is imperfect), and create significant uncertainty.
	Broader Sources of Competition. On the positive side, would consider competition from non-banks and non-local lenders in the antitrust analysis.
	Additional Competition Analyses. Would go beyond an evaluation of competition for deposits in local markets by considering concentrations in other products and services, as well as in regional and national markets, and by considering pricing data – but without explaining how these other factors will be considered.
	Consideration of Management and Board Deliberations. According to a speech by CFPB Director and FDIC board member Rohit Chopra, would require production of the analyses of the deal conducted for the banks' directors and officers, either internally or by investment bankers or consultants.
	Requirements for Divestitures. Would require antitrust-related divestitures to be completed before the merger can close, and would forbid the use of non-compete agreements with employees of divested entities.

OCC Proposal	FDIC Proposal
Managerial and Financial Resources	
Specific Expectations for Target Supervisory Status. Would provide that applications that are consistent with approval generally will involve an acquiring institution *and* a target institution that are "eligible depository institutions." This means that *each* party to the merger should have a CAMELS composite and consumer compliance ratings of 1 or 2, a CRA rating of "Satisfactory," and not have an outstanding enforcement action. It is not clear if the OCC would approve a merger if the target institution is not an eligible depository institution, and this approach appears to represent a departure from existing standards.	***General Consideration of Target Supervisory Status.*** Would consider the managerial resources, including supervisory history and ratings, of both parties to the merger, but would not set forth specific minimum requirements for target entities' supervisory status. While less defined than the OCC approach, the FDIC approach appears to be closer to the agencies' historical practice, which is to consider the target's status only insofar as it affects the prospects of the resulting institution.
Concerns with Rapid Growth. Would provide that the OCC is less likely to approve a transaction when the acquirer has experienced "rapid growth" or has engaged in multiple acquisitions with overlapping integration periods.	***Concerns with Rapid Growth.*** Similar to the OCC, would consider "recent rapid growth" and the record of management in overseeing and controlling risks associated with such growth.
General Concern Over Integration. Would consider IT systems compatibility and integration issues and provide that such issues could be a basis for conditions to be imposed or the transaction to be denied. This focus may require significant upfront work (and cost) by both institutions, even prior to signing a definitive agreement, and acquiring banks may want to preview their integration plans with their supervisory team.	***Specific Integration Planning Expectations.*** Would set forth an expectation for integration plans to cover "human capital; products and services; operating systems, policies and procedures; internal controls and audit coverage; physical locations; information technology; and risk management programs." Would provide for the FDIC to conduct a "comprehensive evaluation" of each entity's AML program and consider whether the resulting bank has developed an appropriate plan for the integration of the combined operations into a single AML program.

OCC Proposal	FDIC Proposal
	Compared to the OCC, the FDIC approach could require even more upfront work by both institutions – particularly in light of the substantial operational AML analyses proposed to be required for the application.
No comparable provision.	***Concern with Transactions that "Weaken" the Acquirer's Financial Standing.*** Would provide that the FDIC will not find favorably on the financial resources factor if the merger would result in a "weaker" bank from an overall financial perspective. It is unclear how the FDIC will apply this requirement, including what financial factors (e.g., asset quality, capital, liquidity, concentration) the FDIC will consider and how material a change would need to be to disqualify the transaction from approval.
No comparable provision that would separately consider each member of management or the performance of affiliates.	***Review of Management Team and Affiliates.*** Would consider the background and experience of each member of management relative to the size, complexity, and risk profile of the resulting bank, including the managerial performance and supervisory record of affiliates and subsidiaries. This requirement, coupled with the FDIC's concerns over rapid growth, could slow an acquirer's ability to engage in multiple acquisitions in a short period of time.
No comparable provision.	***Review of Insider Payments.*** Would consider the reasonableness of fees, expenses, and other payments made to insiders.
No comparable provision beyond a general review of the applicant's liquidity and liquidity risk management.	***Review of Specific Liquidity Factors.*** Would specifically consider the extent of the resulting bank's projected reliance on uninsured deposits and its contingency funding strategies.

OCC Proposal	FDIC Proposal
Convenience and Needs of the Community	
No comparable provision.	***Improved Ability to Serve Community.*** Would provide that a transaction should enable the resulting bank to "*better*" meet the convenience and needs of its communities than would occur absent the merger. Many acquirers already make this showing, but the proposal's lack of objective standards will give the FDIC discretion to deny or impose conditions on more transactions.
General Consideration of Branch Closures. As is the case today, would consider any plans to close, expand, consolidate, or limit branches or branching services, including in low- or moderate-income (LMI) areas.	***Specific Branch Closure Plans.*** Would require applications to include at least three years of information regarding projected branch expansions, closings, or consolidations.
New Focus on Job Losses. Would consider any job losses or reduced job opportunities from branch staffing changes, including branch closures or consolidations. Consideration of job losses and branch closings without any specific standards will create uncertainty as to how many job losses or closings are too much for an approval to be granted.	***New Focus on Job Losses.*** Would closely consider any job losses or lost job opportunities from branching changes.
Financial Stability and Other Size Issues	
Heightened Review at $50 Billion in Assets. Would provide that applications that are consistent with approval generally will involve a resulting institution with total assets of less than $50 billion, thereby enhancing scrutiny on transactions involving larger institutions.	***Added Scrutiny at $100 Billion in Assets.*** Would provide that transactions that result in a bank with $100 billion or more in assets will be subject to added scrutiny.

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Presumption Against G-SIB Acquisitions. Would provide that an application is unlikely to be consistent with approval if the acquirer is a global systemically important banking organization, or subsidiary thereof.	*No comparable provision.*
Public Comment Process	
Public Hearings Based on Size or Public Interest. Would set forth a number of factors that would determine whether the OCC will hold a public hearing on an application, including (1) "the significance of the transaction to the banking industry," which "may include the asset sizes of the institutions involved (e.g., resulting institution will have $50 billion or more in total assets)," and (2) the extent of public interest in the proposed transaction.	***Public Hearings Based on Size or Volume of Protests.*** Would provide that the FDIC generally expects to hold a hearing for any application (1) resulting in a bank with more than $50 billion in assets or (2) for which a "significant number" of CRA protests are received. Like the OCC, the FDIC is signaling that a bank crossing $50 billion in assets should be prepared for a public hearing to be held.
Application Procedures	
Standardize Processing Tracks. Would eliminate the OCC's expedited processing track and streamlined application form for eligible mergers. In practice, these streamlined procedures have not provided significant relief to eligible institutions, so we do not expect a substantial practical effect from this change.	*No comparable provision; the FDIC does not currently have an expedited processing track or streamlined application form.*
No comparable provision.	***Agency Statements on Withdrawn Applications.*** Would provide that if an applicant withdraws its filing, the FDIC may release a statement regarding the concerns with the transaction if such a statement is "considered to be in the public interest for purposes of creating transparency for the public and future applicants."

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	The possibility of such a public statement could have a significant chilling effect on mergers, even when two banks are otherwise eligible for approval. It could also incentivize applicants facing a denial to receive a denial order, which can be challenged in court, rather than withdraw their application.
Other Issues	
Heightened Review of Mergers of Equals. Would provide that applications that are consistent with approval generally will involve a target that has combined total assets that are less than or equal to the acquirer's total assets, thereby creating more scrutiny for mergers of equals. We expect that parties to a merger of equals will likely need to provide additional information to satisfy the OCC that the resulting institution has the managerial resources to complete a successful integration and operate a larger institution.	*No comparable provision.*
Heightened Review of Larger Party Merging into Smaller Party. Would provide that a transaction is less likely to be approved where the acquirer is "functionally the target."	*No comparable provision.*
No comparable provision. However, OCC regulations separately require an application for certain substantial changes in a bank's business, which could include some transactions that would be subject to the FDIC's review under the BMA.	***Expanded Jurisdiction to Review Transactions Under the BMA.*** Would potentially expand the circumstances in which the FDIC would assert its authority to review a transaction under the BMA, including to cover: (1) an insured bank's acquisition of assets that constitute all, or substantially all, of a non-insured entity's assets or business enterprise and the non-insured entity dissolves or otherwise ceases engaging in the acquired lines of business, (2) an insured bank's assumption of a deposit

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	from another insured bank even in the absence of an express agreement for a direct assumption, and (3) situations in which "customers are solicited to transfer their deposits to an [insured bank] in connection with, or in relation to, an arrangement or agreement to which that [insured bank] is party." While the lines the FDIC is drawing are not entirely clear, the FDIC may be expanding the situations in which it expects banks that work with fintech companies in Banking-as-a-Service ("BaaS") and other arrangements to submit a BMA application to establish new relationships.
No comparable provision.	***Scrutiny of Non-Traditional Business Models.*** Would provide that the FDIC's Washington Office or Board of Directors reserves authority to act on certain merger applications that do not involve "traditional community banks." Would provide that a bank that is not a "traditional community bank" generally: (1) focuses on products, services, activities, market segments, funding, or delivery channels other than local lending and deposit taking; (2) pursues a broad geographic footprint (such as operating nationwide from a limited number of offices); (3) pursues a monoline, limited, or specialty business model; or (4) operates within an organizational structure that involves significant affiliate or other third-party relationships (other than common relationships such as audit, human resources, or core information technology processing services). Banks with non-traditional business models, including those that provide BaaS to fintech companies, should be prepared for significantly heightened scrutiny of their merger applications.

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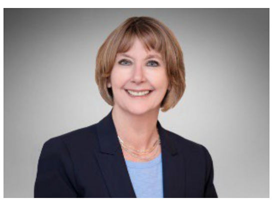

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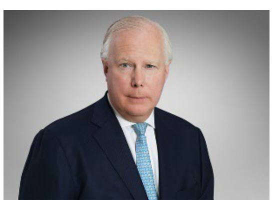

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