ICBA
One Mission. Community Banks.

Summary of FDIC and OCC Bank Merger Statements of Policy (SOPs)

OCC SOP

- The OCC proposes to remove (1) the expedited review procedures in 12 CFR § 5.33(i) and (2) the streamlined applications process described in 12 CFR § 5.33(j). These processes allow a merger that has not received negative comments or raised substantial concerns to be deemed approved as of the 15th day after the close of the comment period.
- The OCC lays out several new "general principles" of merger review designed to clarify how the agency analyzes whether mergers are consistent with approval. Most are unsurprising, with a few exceptions.
- For example, the principles state that mergers where the resulting institution will have total assets less than $50 billion are generally consistent with approval. This implies that mergers where the resulting institution is greater than $50 billion are less likely to be consistent with approval.
- Another proposed principle states that mergers where the target's combined total assets are less than or equal to 50% of acquirer's total assets are generally consistent with approval. We oppose this guideline because it privileges larger banks acquiring smaller competitors and disfavors or disallows mergers of equals.

FDIC SOP

- The FDIC's proposed changes are more expansive than the changes proposed by the OCC.
- The FDIC clarifies that "any merger transaction between an IDI and a credit union is … subject to FDIC approval under the Bank Merger Act." We view it as a positive sign that the FDIC is explicitly recognizing their authority to review such transactions.
- The FDIC would review mergers-in-substance between banks and non-insured institutions, including when a bank purchases all or substantially all of a target entities assets.
- The proposal states that while size will not be the sole factor used to determine whether a bank merger increases the systemic risk in the banking system, "transactions that result in a large IDI (e.g., in excess of $100 billion) are more likely to present potential financial stability concerns with respect to substitute providers, interconnectedness, complexity, and cross-border activities, and will be subject to added scrutiny."
    - FDIC Director Rohit Chopra stated in his prepared remarks: "By codifying this [$100 billion threshold], boards of directors and management at large firms can

understand that the likelihood of approval of megamergers will be low."

- The FDIC will generally consider it is in the public interest to hold a hearing for merger applications resulting in an IDI with greater than $50 billion in assets or for which a significant number of CRA protests are received.
- With respect to the needs and convenience of the community to be served, the rule appears to contemplate a larger role for input from state banking regulators, public commentors, and the CFPB. Director Chopra said the FDIC "will carefully evaluate the banks' compliance records, especially with respect to consumer law. The agency will consult with the relevant state and federal authorities, including the CFPB. Repeat offenders of consumer protection and fair dealing laws will face a steep climb to satisfy this factor."
- In addition, the proposed rule will require banks to show that the merger "will enable the resulting IDI to **better** meet the convenience and the needs of the community to be served than would occur absent the merger." In other words, meeting the needs and convenience of the community adequately well or equally well is no longer sufficient to justify a merger transaction.
    - FDIC Director Jonathan McKernan questioned whether there was sufficient legal justification for the "new expectation . . . that the post-merger bank do 'better' on the convenience and needs factor."
- The proposed SOP appears to apply additional scrutiny to non-community bank mergers. The SOP says: "Merger applications where the resulting IDI will be a non-bank or not a traditional community bank are subject to the same statutory factors as any other merger application. However, the FDIC will appropriately tailor its review to the nature, complexity, and scale of the entities involved in the transaction and the underlying business model. The FDIC's Washington Office or Board of Directors reserve authority to act on certain merger applications that do not involve traditional community banks."