
Section: Mergers with FDIC-Insured Depository Institutions and non-FDIC Insured Entities In which a Savings Institution Survives

Section 230

This handbook section provides information regarding the filing of applications involving the mergers of savings institutions with FDIC-insured depository institutions (including other savings institutions and banks). A savings institution is the surviving entity in these types of transactions. 12 C.F.R. § 563.22(a)(1) sets forth OTS regulatory requirements with respect to these types of transactions.

Transactions in which a thrift institution merges with an FDIC-insured depository institution must also be reviewed by OTS under the Bank Merger Act (Section 18(c) of the Federal Deposit Insurance Act). As discussed in more detail below, there are additional filing and publication requirements for these types of transactions.

In addition, this handbook section provides information about the filing of applications involving the combinations of savings institutions with depository institutions not insured by FDIC, including noninsured OCC-chartered trust companies, state chartered trust companies, and credit unions. A savings institution is the surviving entity in these types of transactions. 12 C.F.R. § 563.22(c) sets forth OTS regulatory requirements with respect to these types of transactions.

FILING REQUIREMENTS

Delegated Authority

Generally, applications filed under this section may be processed by the Regional Office under delegated authority. However, certain situations may cause a filing to be nondelegated, including: (i) transactions raising significant issues of law or policy; (ii) transactions that are hostile or contested; (iii) transactions that raise significant competitive factors issues; and (iv) transactions involving CRA protests. See Delegations Section of the handbook (Section 040) for further information.

Expedited and Standard Processing Procedures

Applications filed under 12 C.F.R. § 563.22(a)(1) are not subject to the expedited processing procedures set forth in 12 C.F.R. Part 516. These applications will be processed utilizing the procedures set forth in 12 C.F.R. §§ 516.210-516.290. For combinations filed under 563.22(a)(1), there is a 30-day automatic approval process set forth in 12 C.F.R. § 563.22(f) which applies in certain situations. Details of this provision are discussed below in the Processing Procedures and Time Frames section.

Applications filed under Section 563.22(c) to acquire non-FDIC insured depository institutions are technically subject to either expedited or standard treatment as set forth in 12 C.F.R. Part 516. However, for most of these types of filings, OTS requires an application as opposed to a notice filing and the standard processing procedures apply. The Regional Office will advise the applicant whether a filing will be processed according to expedited or standard processing procedures.

As discussed in more detail below, OTS does make a distinction between expedited and standard filers for the purposes of determining certain time frames in the processing of combination applications.

Section: Mergers with FDIC-Insured Depository Institutions and non-FDIC Insured Entities In which a Savings Institution Survives

Section 230

An institution is deemed an expedited filer if it:

1. Has a composite CAMELS rating of “1” or “2;”
2. Has a CRA rating of “Satisfactory” or better;
3. Has a Compliance rating of “1” or “2;”
4. Meets or exceeds the minimum capital requirements set forth in 12 C.F.R. Part 567; and
5. Has not been notified that it is in troubled condition.

An institution is deemed a standard filer if it:

1. Has a composite CAMELS rating of “3,” “4” or “5;”
2. Has a less than “Satisfactory” CRA rating;
3. Has a Compliance rating of “3,” “4” or “5;”
4. Has inadequate capital or fails at least one of its capital requirements;
5. Has been notified that it is in troubled condition;
6. The applicant is not a savings institution; or
7. The applicant has not received a composite CAMELS rating, a CRA rating, or a compliance rating from any federal banking regulator.

Prefiling Meeting Requirements

Prefiling meetings are not required for this filing. However, applicants are encouraged to contact the Regional Office, particularly in the event the transaction involves unique or novel issues, to determine if a prefiling meeting will expedite the application review process.

Information and Form Requirements

An institution planning to combine with another insured institution or a noninsured depository institution must file an application with OTS. If the transaction involves two savings institutions, both institutions must receive OTS approval; however, OTS will permit a joint filing by the two institutions.

If delegated, the application should be filed with the appropriate Regional Office in accordance with 12 C.F.R. Part 516. The applicant should file the original and two copies of the application and the application filing fee with the Regional Office. The original filing, all copies, and all exhibits and other pertinent documents must be clearly marked and captioned as to the type of filing. One copy must contain original signatures on all executed documents. For applications that are not delegated to the Regional Office, an additional three copies of the application should be filed with the Applications Filing Room in OTS-Washington.

Section: Mergers with FDIC-Insured Depository Institutions and non-FDIC Insured Entities In which a Savings Institution Survives

Section 230

Applicants subject to the Bank Merger Act (BMA) are required to file four additional copies of the application with the Regional Director. These copies should be distributed by the Regional Office to the Department of Justice, Office of the Comptroller of the Currency, Federal Reserve Board, and Federal Deposit Insurance Corporation.

If the applicant proposes to combine with an FDIC-insured institution and will be the surviving institution of the merger, the applicant should file an application on Form 1639 – Interagency Bank Merger Act Application. As indicated above, if the applicant proposes to merge with another savings institution, the other savings institution must also file with OTS. Two OTS-regulated entities may make a joint filing and submit the appropriate information for each institution.

If the applicant proposes to combine with a non-FDIC insured depository institution and will be the surviving institution of the merger, the applicant should file either an application on Form 1589 – Transfer Application or a notice on Form 1584 – Notice Filing Pursuant to 12 C.F.R. § 563.22(c). (As indicated earlier, OTS will generally require the filing of an application on Form 1589.)

The application should include the following information if it has not otherwise been provided in connection with the application form:

- Sufficient information for OTS to understand the financial condition of the applicant after the merger. If the resulting institution will undergo major changes in its operations as a result of the combination, OTS may require the submission of a complete business plan for the resulting institution. The applicant should contact the appropriate Regional Office to determine if a business plan will be required;
- Sufficient information for OTS to address the criteria set forth in 12 C.F.R. § 563.22(d)(1) and (2);
- Any employment agreements being entered into or amended in connection with the transaction;
- If the applicant is combining with a non-savings institution or a non-FDIC-insured institution, the application should:
 - * Address if the target institution has assets or conducts activities that are not permissible for a federal savings institution under Section 5(c) of HOLA. If the applicant proposes to retain any nonconforming assets pursuant to Section 5(c)(5) of HOLA, a waiver should be requested in the application. The Regional Office has the ability to grant up to two years for the resulting institution to conform its assets to the requirements of HOLA; and
 - * Include detailed calculations that verify that the resulting institution will continue to meet the Qualified Thrift Lender (QTL) test subsequent to the combination. If the resulting institution requests a waiver of the QTL requirements, the application becomes nondelegated.

Section: Mergers with FDIC-Insured Depository Institutions and non-FDIC Insured Entities In which a Savings Institution Survives

Section 230

- The application should indicate if actions are required by any other regulatory agencies. If so, the applicant should specify the agencies, filings, and actions; and
- If the transaction will involve the closing of one or more branch offices, the information required by OTS should be provided. (See Branch Closing section below.)

If the applicant is paying cash to shareholders of the other entity or its holding company, the payment may constitute a capital distribution under 12 C.F.R. § 563.141(c). If so, the application should state that it is also serving as the capital distribution filing.

Confidentiality

The applicant must submit in writing, concurrently with the submission of the application, any requests to keep specific portions of the application confidential. In accordance with the Freedom of Information Act, the request should discuss the justification for the requested treatment and should specifically demonstrate the harm (e.g., to competitive position, invasion of privacy) that would result from the public release of information.

Information for which confidential treatment is requested should be: (i) specifically identified in the public portion of the application by reference to the confidential section; (ii) separately bound; and (iii) labeled “confidential.” The applicant should follow these same procedures when filing supplemental information to the application. OTS will determine whether information designated as confidential must be made available to the public under the Freedom of Information Act. OTS will advise the applicant before it makes information designated as confidential available to the public.

Special Considerations

Publication Requirements

Unless OTS finds that it must act immediately to prevent the default of one of the insured depository institutions involved, the applicant must publish notice of its intent to combine with an FDIC-insured institution no earlier than seven days before and no later than the date of filing of the application, in accordance with the requirements of 12 C.F.R. Part 516 Subpart A. In addition to the initial publication, the applicant must publish on a weekly basis for a 30-day period. Notice must be published in a newspaper printed in the English language and having a general circulation in the community in which the home office of the resulting savings institution is to be located. If the Regional Office determines that the primary language of a significant number of adult residents of the community is a language other than English, the applicant may also be required to publish notice simultaneously in the appropriate language(s). A sample publication notice may be found in the Publication Forms section of the handbook (Section 020).

Comment Procedures

Any person may submit a written comment to the Regional Office supporting or opposing a combination within the publication period. OTS will not consider any late filed comments unless the

Section: Mergers with FDIC-Insured Depository Institutions and non-FDIC Insured Entities In which a Savings Institution Survives

Section 230

commenter demonstrates good cause for why he/she could not submit a timely comment, or OTS concludes that the comment addresses a significant regulatory concern and will assist in the disposition of the combination application. OTS can extend the comment period with demonstrated good cause for why a commenter was unable to submit a timely comment. The duration of an extension request is subject to the discretion of OTS on a case-by-case basis, after consideration of the unique circumstances of each extension request.

The comment should recite relevant facts, including any demographic, economic or financial data supporting the commenter's position. If the commenter opposes the application, the comment should also: 1) address at least one reason for denial based upon regulatory criteria for denial; 2) support the reason for denial with relevant facts and supporting data; and 3) address how the approval of the application is harmful to the community or the commenter. While OTS will accept and consider all comments, including those that do not meet all of the content criteria, commenters are encouraged to include all relevant information and arguments. The commenter may also request an informal meeting pursuant to 12 C.F.R. §§ 516.120 and 516.170 with his/her comment, along with a description of the issues and facts to be discussed and justification for why written submissions are insufficient to adequately address those facts or issues.

If the commenter has filed a written request for a meeting and the request contains the required information set forth in 12 C.F.R. § 516.120(b), OTS will arrange a meeting. If an informal meeting is requested, the commenter must simultaneously send a copy of the written request to the applicant. OTS will generally provide an applicant an appropriate opportunity and period of time to respond to submitted comments.

OTS will facilitate the informal meeting between the applicant, the commenter(s) and any other interested person(s). OTS has discretion to determine the format of the meeting, including telephone conferences or face-to-face meetings. OTS will inform the applicant and commenters requesting an informal meeting of its decision on a request for a meeting, or of its decision to hold an informal meeting on its own initiative. OTS may also invite any other interested persons to attend. OTS will inform the participants of the date, time, location and format for the meeting in reasonable time in advance. OTS anticipates that informal meetings will be sufficient to facilitate the resolution of issues in most cases.

If an informal meeting fails to facilitate the resolution of issues to the satisfaction of any participant in an informal meeting, OTS may proceed to conduct a formal meeting before a presiding officer upon the filing of a request. Any participant requesting a formal meeting pursuant to 12 C.F.R. §§ 516.170 and 516.180, should submit a request to OTS within three days after the informal meeting, and provide copies of its request to the other participants of the informal meeting. The request must describe the nature of the issues or facts to be presented and must demonstrate that material issues or facts have not been adequately addressed by the informal meeting, and that a formal meeting is necessary to develop a record sufficient to support a determination on those facts or issues. OTS will not arrange an informal meeting where a request is clearly frivolous or clearly lacking a factual basis. OTS may elect to hold a formal meeting on its own initiative if deemed necessary to assist in the disposition of the application or issues raised by the application.

Section: Mergers with FDIC-Insured Depository Institutions and non-FDIC Insured Entities In which a Savings Institution Survives

Section 230

OTS will issue a Notice of Formal Meeting if it decides to hold a formal meeting, and send the notice to the applicant, to any person requesting a formal meeting, and to any interested person, in its discretion, it desires to invite. Any person receiving the Notice of Formal Meeting must notify OTS within ten days of receipt of the notice of their intent to participate in the meeting. All participants in the formal meeting must provide the names of their presenters and copies of proposed exhibits to OTS, to the applicant, and to any other person designated by OTS, no later than five days before the date of the formal meeting. All presenters of documentary material must furnish copies of the material to OTS and to each other participant. OTS will arrange for a transcript of the meeting, with each participant bearing the cost of any copies of the transcript it requests for its use.

OTS anticipates that most formal meetings will follow an informal meeting. Accordingly, OTS will not grant a request for a formal meeting unless an informal meeting has occurred. However, OTS has the authority to conduct a formal meeting without holding an informal meeting if the meeting is beneficial to the review process and will facilitate a resolution of the issues raised by application.

If OTS has arranged an informal or formal meeting, the processing time frames for the application are suspended until OTS determines that a sufficient record has been developed to address the issues raised in the comments.

Eligibility Examinations

OTS may conduct an eligibility examination of non-OTS-regulated depository institutions proposing to merge with OTS-regulated institutions. For depository institutions that have recently been examined by a federal or state banking or trust regulator and received satisfactory ratings (CAMELS 1 or 2, Compliance 1 or 2, CRA Outstanding or Satisfactory, Trust 1 or 2), OTS may not require an eligibility examination, unless the application raises a material issue not addressed by the report of examination. Also, when the most recent safety and soundness examination is older than six months, OTS will consider the need for an eligibility examination due to the age of the existing examination report. Absent these concerns, OTS will generally rely on the most recent report of examination as part of its review of the application.

The Regional Office should determine the need for an eligibility examination as early in the application process as possible. The eligibility examination may include on- or off-site activities. Prior to commencing the on-site work, OTS will forward a Preliminary Examination Response Kit (PERK) requesting more detailed information that should be made available to the examiners upon their arrival. OTS does not normally charge a fee for an eligibility examination. However, OTS may impose an hourly fee if the examiners encounter significant problems that require additional review beyond the scope of a standard eligibility examination.

Branch Closings

The closing of one or more branch offices may be involved in connection with a combination transaction. Section 42 of the Federal Deposit Insurance Act and OTS Transmittal 220, dated June 30, 1999, provide information on branch closing notices and procedures.

Section: Mergers with FDIC-Insured Depository Institutions and non-FDIC Insured Entities In which a Savings Institution Survives

Section 230

The institution that is closing a branch must:

- A. No later than 90 days prior to closing:
 - Provide a notice to OTS describing the reasons for the closing and providing statistical or other information supporting the reasons. The notice should also include copies of the institution's branch closing policy statement.
 - Provide a notice of the branch closing to the branch's customers either in a regular account statement or in a separate mailing.

- B. No later than 30 days prior to closing:
 - Post a notice in a conspicuous manner on the premises of the branch proposed to be closed.

Trust Operations

If the target institution is a federal institution that has been approved to exercise trust powers, the acquiror may continue to exercise trust powers. Also, if the acquiror is a state chartered savings institution, it does not need to file a trust application. However, if the applicant is merging with or acquiring a trust operation and has not previously been approved to exercise the appropriate type of trust powers or has not been approved to exercise trust powers in the state in which they will now be exercised, a trust powers application must be filed. See Section 620 of the handbook for guidance on the processing of trust powers applications.

REVIEW GUIDELINES

Processing Procedures and Time Frames

As noted in the Delegated Authority section, certain applications are not subject to delegated authority and are processed concurrently with OTS-Washington staff. As a general matter, correspondence from OTS regarding applications that are nondelegated will be transmitted from OTS-Washington. Correspondence on delegated applications will generally come from the Regional Office.

Within five business days of receipt of the application and the application fee, the Regional Office must notify the applicant of the application's receipt. The appropriate application fee must accompany each application in order for it to be considered filed. For nondelegated applications, the application will not be considered filed until received by both OTS-Washington and the Regional Office.

For nondelegated applications that involve specialty areas, such as CRA, trust, or insurance issues, a copy of the application must be provided to the corresponding OTS-Washington specialist.

Section: Mergers with FDIC-Insured Depository Institutions and non-FDIC Insured Entities In which a Savings Institution Survives

Section 230

Within 30 calendar days of receipt of a properly submitted application, OTS shall take the following actions.

- Deem the application complete;
- Request, in writing, any additional information necessary to deem the application complete; or
- Decline to further process the application if it is deemed by OTS to be materially deficient and/or substantially incomplete.

Failure by OTS to act within 30 calendar days of receipt of the application for processing shall result in the filed application being deemed complete, commencing the period for review.

OTS must review requests for a waiver of an application requirement that certain information be supplied, in a timely manner. Unless OTS requests, in writing, additional information about the waiver request, or denies the waiver request, the waiver request shall be deemed granted.

If additional information is requested, a response must be submitted within 30 calendar days of the letter requesting such information. The applicant may, in writing, request a brief extension of the 30-calendar day period for responding to a request for additional information, prior to the expiration of the 30-calendar day time period. OTS, at its option, may grant the applicant a limited extension of time in writing. Failure to respond to a written request for additional information within 30 calendar days of such request may be deemed to constitute withdrawal of the application or may be treated as grounds for denial or disapproval of the application.

After the timely filing of additional information in response to an initial or subsequent request by OTS for additional information, OTS has 15 calendar days to review the additional information for completeness or appropriateness and take the one of the following actions.

- Request, in writing, any additional information necessary to deem the application complete;
- Deem the application complete; or
- Decline to further process the application if it is deemed by OTS to be materially deficient and/or substantially incomplete.

The 15-day review period commences when OTS receives a response that purports to respond to all questions in the information request. OTS may extend the 15-day review period for an additional 15 calendar days, if OTS requires the additional time to review the response. OTS will notify the applicant that it has extended the period before the end of the initial 15-day period.

Failure by OTS to act within 15 calendar days of receipt of the additional information shall result in the application being deemed complete, commencing the period for review.

Section: Mergers with FDIC-Insured Depository Institutions and non-FDIC Insured Entities In which a Savings Institution Survives

Section 230

Applications filed to combine with an FDIC-insured institution under 563.22(a)(1) are deemed to be automatically approved 30 calendar days after OTS sends written notice that the application is complete, unless:

- The acquiring institution does not meet the criteria for expedited treatment under § 516.5;
- The Regional Office recommends to OTS-Washington the imposition of nonstandard conditions prior to approving the application;
- OTS suspends the applicable time frames under § 516.190;
- OTS raises objections to the transaction;
- The resulting savings institution would be one of the largest depository institutions competing in the relevant geographic market (see 12 C.F.R. §§ 563.22(f)(5)-(f)(7) for further details);
- The Herfindahl-Hirschman Index (HHI) in the relevant geographic area was more than 1800 before the transaction and the increase in the HHI used by the transaction would be 50 or more;
- In a transaction involving potential competition, OTS determines that the acquiring institution is one of three or fewer potential entrants into the relevant geographic area;
- The acquiring institution has assets of \$1 billion or more and proposes to acquire assets of \$1 billion or more;
- The resulting institution has a composite CRA rating of less than satisfactory, or is otherwise seriously deficient with respect to OTS nondiscrimination regulations and the deficiencies have not been resolved to the satisfaction of OTS;
- The transaction involves any supervisory or assistance agreement with OTS or FDIC;
- The transaction is part of a conversion under 12 C.F.R. Part 563b;
- The transaction raises a significant issue of law or policy; OR
- The transaction is opposed by any constituent institution or contested by a competing acquiror.

Applications that do not qualify for the 30-day automatic approval are subject to the 60-calendar day review period during which time OTS will take into consideration all factors present in the application and render a decision thereon. If, upon expiration of the 60-day review period (assuming no extension has been granted) OTS has failed to act, the application is deemed approved automatically, and the applicant may thereafter consummate the transaction.

During the review period, OTS may request additional information if the information is necessary to resolve or clarify the issues presented in the application. OTS may also notify the applicant that the application is incomplete and require that the applicant submit additional information to complete the application. The review period can be extended an additional 30 calendar days if OTS determines that additional time will be required to analyze the proposed transaction. In such cases, OTS must notify an applicant prior to the expiration of the period for review. In situations in which an

Section: Mergers with FDIC-Insured Depository Institutions and non-FDIC Insured Entities In which a Savings Institution Survives

Section 230

application presents a significant issue of law or policy, OTS may extend the applicable period for review of such application beyond the time period for review. In these cases, written notice must be provided to an applicant no later than the expiration of the time period.

Under 12 C.F.R. § 516.290, if OTS has not acted on a pending application within two calendar years after the filing date, OTS may deem the application withdrawn unless OTS determines that the applicant is actively pursuing a final determination on the application. Applications that are subject to this withdrawal provision are those that have failed to timely take action such as filing required additional information, or OTS has suspended processing of an application based on circumstances that are, in whole or in part, within the applicant's control and have failed to take reasonable steps to resolve these circumstances.

Notices under Expedited Treatment

If OTS determines that a combination filing under 563.22(c) may be processed under expedited treatment, OTS must be notified of the transaction at least 30 days prior to the effective date.

Within five business days of receipt of the notice and fee, OTS must notify the applicant of the notice's receipt. The appropriate fee must accompany each notice in order for the filing to be considered filed.

The applicant may engage in the proposed activities upon the expiration of 30 calendar days after the filing date of its notice, unless OTS takes one of the following actions before expiration of that time period:

- Requests, in writing, any additional information necessary to supplement the notification;
- Notifies the applicant that the notice is subject to standard treatment as it raises a supervisory concern, raises a significant issue of law or policy, or requires significant additional information;
- Suspends the time frames pursuant to 12 C.F.R. § 516.190; or
- Disapproves of the notice.

Failure by OTS to act within 30 calendar days of receipt of the notice for processing shall result in the filed notice being accepted. If supplemental information is requested, the applicant will have 30 days to provide such information. The 30-day time frame will begin anew upon receipt of such information.

For purposes of calculating processing time frames, OTS does not include the day of the act or event, in determining the date the time period commences. In determining the conclusion of a time period, when the last day of the time period is a Saturday, Sunday, or a Federal holiday, the last day will become the next day that is not a Saturday, Sunday, or Federal holiday.

Section: Mergers with FDIC-Insured Depository Institutions and non-FDIC Insured Entities In which a Savings Institution Survives

Section 230

Bank Merger Act

The Bank Merger Act (BMA) states that OTS may not approve: (i) any proposed merger transaction that would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States; or (ii) any merger transaction the effect of which, in any section of the country, may be to substantially lessen competition, tend to create a monopoly or, in any other manner, restrain trade, unless OTS finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. Additionally, the BMA requires that OTS take into consideration the financial and managerial resources, future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

Unless it has been determined that immediate action is necessary and competitive factors reports have therefore been dispensed with, the reviewer must send a copy of the application (provided by the applicant as detailed above) to and request reports on the competitive factors involved from the Attorney General (Department of Justice); the Comptroller of the Currency; the appropriate Federal Reserve Bank; and the Federal Deposit Insurance Corporation. Generally, the reports should be furnished by the agencies within 30 calendar days of request. However, in certain emergency situations this time frame may be lessened to ten days (see § 563.22(e)(2)).

For certain transactions that are inherently competitively neutral, the Department of Justice has agreed to allow OTS to use a streamlined processing procedure. Such transactions include: (i) mergers between savings associations if at least 50 percent of the voting stock of the involved institutions is owned by the same company, person, or group of persons and/or companies acting in concert, or if one of the savings associations controls the other; (ii) the purchase of assets and assumption of liabilities of branch offices, if a single savings and loan holding company owns more than 50 percent of the outstanding voting stock of each of the savings associations involved in the transaction; and (iii) mergers between an interim savings association and an existing savings association to facilitate the formation of a unitary savings and loan holding company.

For competitively neutral transactions the initial letter sent with the application copy to the Department of Justice will indicate that the transaction is deemed to have received “interim approval” and request confirmation that the application is subject to the special processing procedure. Provided OTS’s final approval of the application is granted after passage of 30 days from the filing date, the transaction may be consummated immediately upon approval as opposed to waiting 15 days after approval as required under ordinary BMA transactions.

Immediately upon approval of an application, OTS must provide a letter to the Attorney General/DOJ informing it of the approval and including a copy of the approval letter/order.

Sample BMA letters for each of the above scenarios are included in the Bank Merger Act Transmittal Forms Section of the handbook (Section 030).

Section: Mergers with FDIC-Insured Depository Institutions and non-FDIC Insured Entities In which a Savings Institution Survives

Section 230

Regulatory Criteria

The authority of OTS to act on a combination application involving an FDIC-insured institution is set forth in 12 USC § 1828(c)(2) and 12 C.F.R. § 563.22. Additionally, OTS must consider combination applications under the Community Reinvestment Act of 1977, 12 USC §§ 2901-2905, as set forth in 12 C.F.R. Part 563e.

For all applications filed under 12 C.F.R. Section 563.22(a) and (c), OTS will consider the following criteria.

- The capital level of the resulting savings institution;
- Managerial resources of the constituent institutions;
- The financial resources and future prospects of the constituent institutions;
- The convenience and needs of the communities to be served;
- The conformity of the transaction to applicable law, regulation, and supervisory policies; and
- Factors relating to the fairness of and disclosure concerning the transaction.

With regard to the effect of the CRA on combination applications, the resulting institution's record in meeting the credit needs of its community, consistent with safe and sound operations, is a consideration in approval of the application.

Decision Guidelines

The statutory and regulatory requirements for determining whether OTS should approve a merger application are designed to ensure the viability and safe and sound operation of the resulting savings institution. In general, the analysis should conclude that capital of the resulting institution is sufficient to support the operations of the merged entity and that management has the necessary expertise and controls to implement the business plan of the resulting institution. OTS should conclude that the community will be served and that the transaction will comply with applicable rules and regulations. In addition, the transaction should be fair to all parties concerned (savings account holders, borrowers, creditors, and stockholders of each savings association). OTS should consider the following factors in analyzing the application to determine if the transaction satisfies the applicable statutory and regulatory criteria for approval:

- Did the applicant submit the following forms and information?
 - * OTS Form 1639, OTS Form 1584, or OTS Form 1589;
 - * Copies of proposed employment contracts and evidence of regulatory compliance;
 - * Pro forma financial information, including capital calculations, showing the impact of the combination on the resulting institution and for the first year following the combination;
 - * If required by OTS, a three-year business plan for the resulting institution;

Section: Mergers with FDIC-Insured Depository Institutions and non-FDIC Insured Entities In which a Savings Institution Survives

Section 230

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- * Additional copies of the application to be forwarded to the Department of Justice and other banking regulators for review under the Bank Merger Act;
 - * If there will be any changes in market area to be served, an amended CRA plan for the resulting institution;
 - * If applicable, a branch closing notice; and
 - * Information to demonstrate that the application meets relevant approval standards.
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- If the merging institution is not an OTS-regulated entity, has the Regional Office contacted the appropriate regulator to discuss the supervisory and examination background of the institution? Has the Regional Office obtained and reviewed examination reports from the primary federal or state regulator?
 - If there is not a recent examination of the institution to be acquired and merged or if there are significant risks to be acquired or unresolved regulatory concerns, has the Regional Office conducted an eligibility examination of the institution?
 - Has the applicant made the appropriate branch closing notification to customers, if applicable?
 - Has the applicant complied with the HOLA, and all other laws, rules, and regulations and policies of the OTS concerning combinations?
 - Does the application include a narrative summary of the plan or merger, including a full description of the basic terms and conditions of the plan?
 - Does the transaction appear to be the result of arms' length bargaining?
 - Does the application include evidence of approval of members or stockholders, as applicable?
 - Do the resulting board of directors and senior management have the qualifications and experience necessary to operate the institution in a safe and sound manner?
 - Is compensation, including deferred compensation, to be paid to officers, directors, and controlling persons of the disappearing institution by the resulting institution reasonable?
 - Are any proposed increases in compensation to officers and directors of the disappearing institution reasonable? Note that an increase in excess of the greater of 15 percent or \$10,000 gives rise to a presumption of unreasonableness and sale of control. Sufficient information should be submitted to rebut this presumption (for example, increased responsibilities and duties of management).
 - Will an advisory board be elected? If so, members should not be elected for a term greater than 1 year.
 - Does the application describe and justify the duties and responsibilities and any compensation to be paid to the advisory board?
 - Are advisory board fees reasonable? Note that advisory board fees in excess of 115 percent of directors' fees paid by the disappearing savings institution prior to the transaction will give rise to a presumption of unreasonableness and sale of control. Sufficient information should

Section: Mergers with FDIC-Insured Depository Institutions and non-FDIC Insured Entities In which a Savings Institution Survives

Section 230

- be provided to rebut this presumption (for example, increased responsibilities and duties of the directors).
- Do proposed employment agreements comply with the requirements of 12 C.F.R. § 563.39 and RB 27-a?
 - Will the balance sheet and business strategy of the merged institution comply with the lending and investment limitations of Section 5(c) of HOLA and 12 C.F.R. Part 560?
 - Has the applicant provided financial projections for the combined institution that are reasonable and well supported?
 - Is the transaction consistent with the applicant's business objectives?
 - Has the applicant provided for appropriate management and policies for any significant new activities or risks to be assumed?
 - How does the transaction change the institution's risk profile?
 - Will future operations be profitable?
 - Does the application provide information concerning the accounting and tax treatment of the transaction?
 - Is the resulting institution's establishment or operation of additional branches consistent with OTS's branching policy statement (12 C.F.R. § 556.5) and Section 5(r) of HOLA?
 - Are the fees to be paid for any professional services in connection with the transaction fair?
 - Do the financial projections demonstrate compliance with OTS capital requirements?
 - Is capital adequate based on the proposed business philosophy of the resulting institution?
 - If a capital distribution is proposed in connection with a combination, can the distribution be paid under 12 C.F.R. § 563.141(c)?
 - Does the applicant indicate that QTL compliance will be maintained?
 - Does the resulting institution have a satisfactory history of compliance with the CRA and a reasonable plan to meet its obligations under the CRA in the future?
 - If the transaction will result in any lessening of competition in any section of the country, are the anticompetitive effects clearly outweighed by the probable effect of the transaction in meeting the convenience and needs of the communities to be served?
 - Has OTS received responses from the Department of Justice and the banking regulators regarding the competitive factors involved in the transaction?
 - Will the resulting savings institution meet the identified convenience and needs in the target market, including the low- and moderate-income needs?
 - Will the resulting institution continue to provide credit for housing consistent with safe and sound banking principles?

Section: Mergers with FDIC-Insured Depository Institutions and non-FDIC Insured Entities In which a Savings Institution Survives

Section 230

Conditions

Generally, the following conditions will be imposed on any approval for a savings institution to combine with an FDIC-insured or a non-FDIC insured depository institution.

- The Savings Bank must receive all required regulatory approvals for the proposed transaction and submit copies of all such approvals to the Regional Director prior to consummation of the proposed transaction;
- The proposed transaction must be consummated no earlier than 15 calendar days (*if subject to BMA*) and no later than 120 calendar days from the date of the approval letter;
- On the business day prior to the date of consummation of the proposed transaction, the chief financial officer of the Savings Bank must certify in writing to the Regional Director that no material adverse events or material adverse changes have occurred with respect to the financial condition or operation of the Savings Bank as disclosed in the application;
- The Savings Bank must advise the Regional Director in writing within five (5) calendar days after the effective date of the proposed transaction: (a) of the effective date of the proposed transaction and (b) that the transaction was consummated in accordance with all applicable laws and regulations, the application, and the approval letter; and
- The Savings Bank shall advise each accountholder whose withdrawable accounts would increase above \$100,000 as a result of the transaction of the effect on their insurance coverage no later than thirty (30) days after the effective date.

OTS may impose certain nonstandard conditions in connection with a merger transaction. All nonstandard conditions of approval must be supported with justification in the recommendation memorandum related to approval of the application. All nonstandard conditions incorporated into the approval letter must be summarized in the National Applications Tracking System for the application. Listed below are examples of frequently imposed nonstandard conditions:

- The institution must comply with the asset investment limitations contained in Section 5(c)(2)(D) of HOLA within 2 years.
- The institution must obtain the written approval of the Regional Director prior to execution or implementation of any employment agreements to be entered into in connection with the transaction.

RECORDKEEPING REQUIREMENTS

OTS is required to consolidate all correspondence related to the processing of the notice or application into a file copy to be sent to a central file. Both the Regional Office and OTS-Washington will maintain a separate file copy for nondelegated filings. The file copy must include a copy of the original filing including all exhibits, all amendments, all internal and external correspondence between interested parties, all documentation associated with the review and analysis of the filing, and all decision, recommendation memorandum, and compliance material. The file copy must be

Section: Mergers with FDIC-Insured Depository Institutions and non-FDIC Insured Entities In which a Savings Institution Survives

Section 230

organized and separated into public and confidential material, and clearly identified as such. The public and confidential sections must be arranged in chronological order.

MONITORING AND CONTROL

The Regional Office will monitor compliance with any conditions imposed in connection with an application's approval. The applicant must submit evidence of satisfaction of the conditions included in the approval order or letter to the Regional Office within the stated time frames.

The Regional Office should notify the appropriate staff responsible for the supervision and examination of the institution regarding the action taken on an application. In addition, the Regional Office should provide the appropriate staff with copies of the approval order or letter. If an application is approved, the first examination of the institution following the approval should include a review of compliance with all conditions of approval and any changes in operations as a result of the transaction.

A review of the application file should be made after all compliance material is received to ensure that the file is complete. Any deficiencies should be corrected before the file is sent to storage.

OTS-Washington may conduct a post audit review of the application in the Regional Office, including a review of the documentation maintained in the application file.

INFORMATION SOURCES

Statutes

- Section 3(l) FDIA (12 USC § 1813(l))
- Section 3(p) FDIC (12 USC § 1813(p))
- Section 5(c) HOLA (12 USC § 1464(5)(c))
- Sections 5(d)(2) and (3) FDIA (12 USC § 1815)
- Section 5(r) HOLA (12 USC § 1464(r))
- Section 10(m) HOLA (12 USC § 1467a)
- Section 18(c) FDIA (12 USC § 1828(c))
- Section 42 FDIA (12 USC § 1831r-1)
- 12 USC §§ 2901-2905

Regulations

- 12 C.F.R. Part 516
- 12 C.F.R. Part 546
- 12 C.F.R. § 552.13
- 12 C.F.R. § 556.5
- 12 C.F.R. § 563.22
- 12 C.F.R. § 563.39
- 12 C.F.R. § 563.141(c)

Section: Mergers with FDIC-Insured Depository Institutions and non-FDIC Insured Entities In which a Savings Institution Survives

Section 230

12 C.F.R. § 330.4 (FDIC's Deposit Insurance Coverage regulations)
12 C.F.R. Part 563e

OTS Bulletins/Memoranda/Orders

Transmittal 220, June 30, 1999
Regulatory Bulletin 27a, March 5, 1993
Legal Alert Memo 10, December 8, 1989
Legal Alert Memo 17, October 26, 1990
Order No. 95-177, September 26, 1995
Thrift Bulletin 48-17

Other

FDIC Deposit Summary - Can be accessed from the FDIC's web page. Specific address:
www.fdic.gov/news/publications/public/index.html#statistical

U.S. Department of Justice Merger Guidelines, June 14, 1982

OTS Forms

Form 1584
Form 1589
Form 1639