# CSBS Letter: OCC Licensing Amendments

May 4th, 2020

Office of the Comptroller of the Currency
Chief Counsel's Office
400 7th Street, SW, Suite 3E-218
Washington, DC 20219
Docket ID OCC-2019-0024

Re: *Licensing Amendments.*

The Conference of State Bank Supervisors (CSBS)[1] writes to express its disappointment that the Office of the Comptroller of the Currency (OCC) has—in the midst of a global pandemic which has resulted in widespread economic turmoil and swift, unprecedented policy responses—decided that now is the appropriate time to propose substantial reforms to its licensing rules through the notice of proposed rulemaking titled "Licensing Amendments" (Docket ID OCC-2019-0024) (the proposed rule). Our disappointment is only aggravated by the highly unusual process employed in issuing the proposal, by the questionable validity as to several aspects of the proposal, and by the general lack of clarity as to the intent and/or impact of many of the proposed reforms. As explained in this letter, CSBS is concerned that the OCC has provided inadequate opportunity for public consideration and comment by rushing the proposed rule through the rulemaking process in the midst of a global pandemic.

While current circumstances preclude an in-depth discussion of the substantive aspects of the proposal, we have attached an Appendix to this letter which outlines at least some of the points we would have made had more time been afforded. As explained in the Appendix, (1) CSBS believes that several proposed amendments to the licensing rules, particularly the proposed combination rules, are likely legally invalid; and (2) CSBS requests clarity regarding the intent and impact of, as well as the legal basis for, several other proposed amendments. For these reasons, CSBS urges the OCC to withdraw the proposed rule and refrain from reissuance both until after the current crisis has abated

and until the OCC can fulfill its duty to examine and explain key assumptions underlying the proposed rule.

The COVID-19 pandemic has caused massive loss of life and economic disruption that has wreaked havoc on American businesses and consumers over the past two months. In response, decisive, sweeping policy actions have been taken to mitigate the negative consequences which the pandemic has wrought for the economic security and welfare of American households and businesses. Federal and state financial regulators have mobilized as a part of this process. Indeed, over the past two months, federal agencies that oversee various parts of the financial system have collectively issued over 80 rules, guidance documents, and policy statements directly related to COVID-19. A similar proliferation of pandemic-related legislation and regulation has taken place at the state level.

Given the sweeping nature of the response over the past two months and the commitment of public and private sector resources thereto, we do not understand how the OCC could conclude that this is an appropriate time to issue an over 60,000-word proposed rule containing over 2000 amendments to the OCC's licensing regulation, and, further, why, in a highly unusual move, the OCC has adopted a truncated notice-and-comment process. Specifically, the OCC has tolled the 60-day period provided to comment on the proposal from the date the proposal was published on the OCC’s website rather than, as is customary, from the time the proposal was published in the Federal Register.[2]

This rushed rulemaking process raises serious questions as to whether the OCC has provided the actual and timely notice required by the Administrative Procedures Act (APA).[3] More generally, following this process while all governmental resources have been mobilized in response to a pandemic flouts the very purpose of notice-and-comment requirements, namely, ensuring mature consideration of proposed rules, promoting responsiveness to the public by unelected officials, and preserving the right of affected parties to be heard, which is basic to fundamental fairness. The use of this truncated process raises doubt that the OCC has maintained a flexible and open-minded attitude toward the proposed rule and whether raising concerns and requesting changes to the proposal is merely a futile endeavor.

Regardless of the OCC’s intentions, CSBS believes that using this rushed rulemaking process in the midst of a global pandemic has deprived the public of an adequate

opportunity to consider and comment on the proposed rule. It is, in part, for this reason that we urge the OCC to rescind the proposed rulemaking and to refrain from reissuing the proposed rule until such time as the public and private sector is not fully consumed by the need to respond to the COVID-19 pandemic. Only at such a time and only through reasonable notice-and-comment procedures can the mature and fair consideration of the proposed rule intended by APA notice-and-comment requirement take place.

Sincerely,

John Ryan

**APPENDIX**

CSBS believes that several proposed amendments to the licensing rules, particularly the proposed combination rules, are likely legally invalid.

The proposed rule puts forth several amendments to the OCC's licensing rules which would likely be deemed invalid upon review. Again, under the circumstances, it is not feasible for us to outline every aspect of the proposal which is legally questionable. However, by way of example, we will detail why the OCC's proposed amendments to its combination rules falls into this category, in part, because the OCC provided relatively greater insight into the intent and legal basis for these proposed amendments. In particular, the discussion that follows highlights how the proposed amendment permitting national banks to engage in choice-of-law for statutory merger and consolidation procedures is likely invalid.

The proposed rule would add numerous provisions to 12 CFR 5.33 to permit national banks and FSAs to elect to follow the procedures applicable to state banks or state savings associations, respectively, for certain business combinations, including interstate consolidations and mergers resulting in a national bank under Section 4 of the National Bank Consolidation and Merger Act (NBCMA) (12 U.S.C. 215a-1). This proposed amendment, codified in Section 5.33(h), is based on the OCC's novel conclusion that the National Bank Consolidation and Merger Act (NBCMA) establishes no statutory procedures for interstate bank combinations resulting in a national bank.

Section 4 of the NBCMA states that "a national bank may engage in a consolidation or

merger under this Act with an out-of-State bank if the consolidation or merger is approved" under 12 U.S.C. 1831u, which governs interstate mergers of insured banks. To support its conclusion that there are no statutory procedures for interstate combinations, the OCC is now interpreting "under this Act" as only referring to Section 4 itself, rather than to section 2 or 3 of the NBCMA (12 U.S.C. 215 and 215a, respectively), which set out statutory procedures for consolidations and mergers, respectively, between national banks and State or national banks located in the same State resulting in a national bank.

The proposed rule acknowledges that this proposed interpretation conflicts with prior licensing decisions in which the OCC interpreted ''under this Act'' to mean that a consolidation or merger under section 4 of the NBCMA is also a consolidation or merger under section 2 or 3 of the NBCMA, respectively, and thus subject to the statutory procedures set out therein.[4] Obviously, the OCC's interpretation of "under this Act" is in itself highly questionable solely for plain language reasons which are fairly self-evident.[5] Moreover, the OCC's reasoning in support of this interpretation indicates a broader interpretive contradiction which is not addressed in the proposal and which ultimately undermines its validity.

In particular, the OCC now believes that "under this Act" is more properly read as not referring to section 2 or 3 because, the proposed rule states, "[a] consolidation or merger with an out-of-State bank generally may not be approved under sections of 2 and 3 of the NBCMA, which specifically apply to consolidations or mergers, respectively, between banks located in the same State." But the OCC does not acknowledge that this statement directly contradicts the past (and presumably current) interpretation of section 2 and 3 of the NBCMA by the OCC and the courts.

Section 4 of the NBCMA was enacted by section 102(b)(4)(D) of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 to create a new merger authority that allows mergers between banks with different home states. The Riegle-Neal Act, in 12 U.S.C. 1831u, subjected interstate mergers to certain conditions imposed under state law—including compliance with state-imposed age limits, certain state filing requirements, deposit concentration limits, etc.—and also allowed states to opt-out of the new interstate merger authority by enacting laws prohibiting interstate mergers transactions with out-of-state banks.

Several states did elect to opt-out as allowed by Riegle-Neal, including the state of Texas. Shortly thereafter, a national bank sought approval to acquire an out-of-state bank whose

home state was Texas.6 To allow the merger to proceed despite Texas opting out, the OCC found the merger to be authorized under section 3 of the NBCMA. In particular, the OCC concluded that because the acquiring national bank already had branches in Texas, the banks were "located within the same state" for purposes of section 3 even though the target bank was an out-of-state bank under Riegle-Neal. The OCC's interpretation was subsequently challenged by the Texas banking commissioner and upheld in Ghiglieri v. NationsBank of Texas, N.A., 1998 U.S. Dist. LEXIS 6637 (N.D. Texas, May 6, 1998). The OCC has repeatedly described Ghiglieri as "agreeing with OCC position that out-of-state bank was located in Texas for section 215a merger purposes because it had branches there."[7]

Importantly, the OCC's position that consolidations and mergers with out-of-state banks may be approved under sections 2 and 3, respectively, has been cited by the OCC not only to nullify states attempts to opt out but, time and again, to avoid the other Riegle-Neal restrictions under 12 USC 1831u (e.g. state age limits, deposit concentration limits), including in some of the largest bank mergers in history.[8] Yet, now, the OCC is asserting that combinations with out-of-state banks cannot be approved under sections 2 and 3 in order to support its conclusion that Section 4 establishes no statutory procedures for interstate bank combinations resulting in a national bank.

If it were true that combinations with out-of-state banks cannot be approved under sections 2 and 3 of the NBCMA, then the OCC would also have to reverse the interpretation endorsed in Ghiglieri by concluding that a bank is not located in a state for purposes of sections 2 and 3 by virtue of having a branch in that state. Due to this reversal, the Riegle-Neal limits in 12 USC 1831u would apply to all combinations involving banks with different home states rather than only applying to a bank's initial entry into a state.

However, we presume that the OCC is not now concluding that 12 USC 1831u applies to interstate combinations that do not involve initial entry because the proposal does not specifically state this conclusion. As a result, under the OCC's proposed interpretation, a combination of a national bank with an out-of-state bank would not be authorized under sections 2 or 3 so as to allow the national bank to choose its preferred state law merger procedures, but would be authorized under sections 2 and 3 to allow the national bank to avoid the Riegle-Neal requirements for interstate combinations. Obviously, it is unreasonable to interpret sections 2 or 3 as simultaneously authorizing and not authorizing the same combination transaction. Thus, it is unlikely that the proposed

interpretation would be deemed valid when placed under judicial scrutiny.

Lastly, even if the OCC did reverse the interpretation of sections 2 and 3 endorsed in Ghiglieri such that 12 USC 1831u now applies to all interstate combinations even if they do not involve initial entry, there would still be serious questions as to the validity of the proposed rule for constitutional reasons. Specifically, proposed section 5.33(g)(2)(iv) includes a new corporate succession provision for interstate mergers resulting in a national bank to ensure that the resulting bank succeeds to the rights, franchises, and interests, including the fiduciary appointments, of the consolidating or merging banks.[9]

Corporate successorship and the transfer of fiduciary appointments, particularly in the context of transfers of rights and franchises from state to federal corporations are matters of constitutional import which Congress itself must resolve.[10] In this area, Congress is not unlimited in its authority and must take care not to contravene state law, which Congress has done in sections 2 and 3.[11] The notion that, in enacting section 4, Congress purposefully did not provide statutory procedures for interstate mergers, including corporate successorship and non-contravention provisions, is not only nonsensical but, if true, then section 4 itself likely runs afoul of the Tenth Amendment. Of course, the OCC's failure to incorporate any non-contravention language in proposed section 5.33 while also allowing national banks to use merger procedures under the laws of a state with which they have no connection or even model laws adds another layer of constitutional infirmity.[12]

In sum, the OCC's proposed combination rules are likely invalid for the many reasons outlined above. CSBS notes that there are likely other aspects of the proposed rule which are equally questionable on legal grounds. However, given the present need to devote resources to pandemic response and the time afforded to comment on the proposal, it is simply not feasible to ferret out and explain every instance of overreach. Additionally, as explained below, there are number of proposed amendments for which further clarity is needed because insufficient information has been provided as to intent and/or legal basis to inform a potential response.

CSBS requests clarity regarding the intent and impact of, as well as the legal basis for, several proposed amendments to the licensing rules.

The proposed rule amends certain aspects of the OCC's licensing rules without providing sufficient information as to the intent and the impact of the proposed revision or its legal

basis. Without further clarity, it is not feasible to fully assess the proposed change on legal and policy grounds. Accordingly, state regulators request further clarity regarding some of the substantive changes in the proposal, including those outlined below.

For instance, the proposed rule would amend section 5.34 to specify that a trust formed for purposes of securitizing assets held by the bank as part of its banking business would not be considered an operating subsidiary. The proposal states that this "would codify the OCC's position that securitization trusts generally do not qualify as operating subsidiaries because of the bank's limited control over the trust and because beneficial interests in trusts lack many of the indicia of traditional equity." In making this statement, the OCC does not cite any authority for the proposition that the OCC's current position is that securitization trusts are not operating subsidiaries. Nor does the proposal explain the intent or expected impact of providing that securitization trusts are not operating subsidiaries. The proposal would likewise exclude securitization trusts from the definition of non-controlling investments and, here again, little to no information is provided.

Another proposed change where insufficient information is provided is the proposed de minimis procedure in the combination rules. Proposed section 5.33(p) would allow a national bank or Federal savings association that is the acquiring institution in a transaction to follow a de minimis procedure not requiring a shareholder vote pursuant to proposed § 5.33(p) if certain criteria are met. In explaining this change, the proposal states "[t]he OCC believes that in a transaction involving reorganization into a holding company structure, shareholders of the national bank or Federal stock savings association should have the opportunity to vote. However, the OCC believes that a national bank or Federal stock savings association may engage in transactions involving interim banks or savings association that do not involve holding company reorganizations where shareholder votes are not necessary." The OCC never explains what other interim bank combinations it is referring to nor which of those structures would be permitted under the de minimis procedures.

Another instance where further clarity is needed is with respect to the proposed amendments to the OCC's chartering regulation, 12 CFR 5.20. Although referred to as a technical change, the proposed rule would revise the definition of ''organizing group'' by changing the term ''persons'' to ''individuals'' to more accurately reflect who may make up an organizing group. The proposal does not set out the OCC's understanding as to who may make up an organizing group or how the scope of the term "persons" differs from "individuals".

There are further instances where additional information and clarity is needed; however, given the circumstances and manner in which this rule was proposed, it is simply not possible to detail each instance. More generally, CSBS reminds OCC that, under the APA, it has a duty to examine and explain key assumptions as part of its affirmative burden of promulgating and explaining a nonarbitrary, non-capricious rule. Unfortunately, it seems the OCC has not fulfilled this duty in this proposed rulemaking.

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[1] CSBS is the nationwide organization of state banking and financial regulators from all 50 states, American Samoa, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. CSBS supports the state banking agencies by serving as a forum for policy and supervisory process development, by facilitating regulatory coordination on a state-to-state and state-to-federal basis, and by facilitating state implementation of policy through training, educational programs, and exam resource development.

[2] A draft notice of proposed rulemaking was published on the OCC website on March 6th, 2020 with a comment period deadline of May 4th, 2020. The official notice of proposed rulemaking was published in the Federal Register on April 2nd, 2020. *See* 85 Fed. Reg. 18728 (Apr. 2, 2020).

[3] *See Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749 (D.C. Cir. 2001) (Internet notice is not acceptable substitute for publication in Federal Register).

[4] *See* CRA Decision # 94 (May 20, 1999); Corporate Decision # 99-34 (October 1, 1999); Conditional Approval # 658 (October 13, 2004).

[5] *See id.* ("The phrase "under this Act" in section 215a-1 clearly makes mergers under section 215a-1 subject to these provisions of section 215a. If they were not intended to be applicable, section 215a-1 would simply have authorized mergers that met the requirements of section 44, without any reference to the rest of the National Bank Consolidation and Merger Act."). This interpretation was recently endorsed in *First Nat'l Bank of Pa. v. Transamerica Life Ins. Co.*, 2017 U.S. Dist. LEXIS 104082, at *33 (W.D. Pa. July 6, 2017).

[6] *See* Corporate Decision # 98-19 (April 2, 1998).

[7] Corporate Decision # 2001-29 (September 28, 2001); Conditional Approval # 687 (April 25, 2005); Conditional Approval # 1105 (Aug. 11, 2014).

[8] *See* Corporate Decision # 95-17 (April 20, 1995); Corporate Decision # 95-18 (May 25, 1995); CRA Decision # 118 (November 6, 2003).

[9] In at least 50 interpretive letters, the OCC applied the corporate successorship provisions in sections 2 and 3 of the NBCMA to combinations authorized under section 4 to allow for the transfer of fiduciary appointments as permitted under sections 2 and 3.

See Corporate Decision # 96-30; Corporate Decision # 96-31; Corporate Decision # 96-36; Corporate Decision # 96-44; Corporate Decision # 96-46; Corporate Decision # 96-47; Corporate Decision # 96-49; Corporate Decision # 97-29; Corporate Decision # 97-33 through # 97-47; Corporate Decision # 97-51 through # 97-53; Corporate Decision # 97-55; Corporate Decision # 97-61; Corporate Decision # 97-69 through # 97-75; Corporate Decision # 97-86 through # 97-88; Corporate Decision # 97-90; Corporate Decision # 97-96; Corporate Decision # 97-103 through # 97-104; Corporate Decision # 98-07; Corporate Decision # 98-18
Corporate Decision # 98-20 through #98-21; CRA Decision # 81 through # 82; Corporate Decision # 98-18; Corporate Decision # 99-28; Conditional Approval # 454; CRA Decision # 109.

[10] *See Hopkins Fed. Savings & Loan Ass'n v. Cleary*, 296 U.S. 315, 337 (1935) (ruling that "[formation, maintenance, supervision, and dissolution of state-chartered corporations] are matters of governmental policy, [therefore] it would be an intrusion for another government to regulate by statute or decision.").

[11] *See* 12 U.S.C. 215(d) (“ . . . and no such consolidation shall be in contravention of the law of the State under which such bank is incorporated.”); 12 U.S.C. 215a(d) (“ . . . and no such merger shall be in contravention of the law of the State under which such bank is incorporated.”).

[12] *See Hopkins Savings Ass’n*, 296 U.S. 315 (ruling that a statute allowing state-chartered institutions to convert to federal charters without the state's permission violated the Tenth Amendment).

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