

COMPTROLLER'S LICENSING MANUAL

# Failure Acquisitions



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# Introduction

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This booklet sets forth the Office of the Comptroller of the Currency's (OCC) policies and procedures for a national bank or a federal savings association (collectively, banks) seeking to participate in the Federal Deposit Insurance Corporation's (FDIC) process for resolving a failing insured depository institution (IDI).

The OCC's approval is required before a bank may acquire a failing IDI through the FDIC bidding process. Although failure acquisitions may be structured in many ways, this guidance discusses the most common type, a purchase of some or all of the assets and assumption of some or all of the liabilities, including all insured deposits, of a failing IDI by a bank.

Banks should contact the appropriate OCC licensing office to discuss filing requirements, timelines, and other issues. Banks unfamiliar with the failure acquisition process should discuss their plans and any other related questions with the OCC well in advance of submitting an application. Organizing groups that are interested in chartering a new bank for the purposes of bidding on a failing IDI should consult with licensing for guidance regarding the charter process and refer to the "[Charters](#)" booklet for additional guidance and specific filing instructions.

When a bank seeks to acquire a failing IDI, other requests may be submitted to the OCC with the purchase and assumption (P&A) application. These requests may include applications for investment in subsidiaries, equity investments, new branches, branch relocations, and fiduciary powers. Each request should be responsive to the OCC's specific filing requirements, as applicable.

Refer to the "[General Policies and Procedures](#)," "[Charters](#)," "[Branches and Relocations](#)," "[Business Combinations](#)," "[Investment in Subsidiaries and Equities](#)," "[Fiduciary Powers](#)," and "[Management Interlocks](#)" booklets of the *Comptroller's Licensing Manual* for further guidance.

# Bid Process

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## FDIC

After being notified of the potential failure of an IDI, the FDIC prepares to be appointed receiver and to sell the IDI in its role as receiver. An overview of the FDIC's process is available at [FDIC.gov](https://www.fdic.gov).

The FDIC works with the applicable chartering authorities and federal regulators to resolve failing IDIs. The FDIC's Division of Resolutions and Receiverships compiles a list of IDIs, bank holding companies, savings and loan holding companies, individuals, and chain banking groups<sup>1</sup> that may be interested in acquiring the failing IDI and that meet specific requirements established by the FDIC. This list is commonly referred to as the "bid list." The FDIC provides the bid list to the OCC, the Federal Reserve, and the appropriate state banking regulatory authorities to obtain additional supervisory information about the prospective acquirers. The FDIC retains the ultimate authority to include or exclude a potential acquirer, although it excludes a bank if the appropriate banking regulatory agency objects to the bank's inclusion on the bid list.<sup>2</sup>

The P&A is the most common method used by the FDIC to resolve a failing IDI. This transaction can vary based on such factors as the amount of time available to arrange the transaction, the location and size of the failing IDI, the nature of its deposits, and the assets available for sale. Generally, the FDIC attempts to sell as many of the failing IDI's assets and deposits as possible at the time of closing; however, the results of the winning bid must meet the mandated lowest cost to the FDIC Deposit Insurance Fund requirement. For more information on the different types of FDIC resolution transactions and the resolution process, refer to the FDIC's [Resolutions Handbook](#).

## OCC

The OCC's licensing office reviews the bid list and confirms through the Supervisory Office that any listed bank may remain on the bid list. If the OCC determines that a bank should not be on the bid list, it requests that the FDIC remove that bank from the bid list. The OCC also notifies the bank whether or not it may remain on the bid list. The licensing office contacts the U.S. Department of Justice (DOJ) indicating the name of the failing IDI and the name of any bank that is interested in submitting a bid.

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<sup>1</sup> These are groups that control several banks, but not through a holding company structure.

<sup>2</sup> The FDIC may revise the bid list throughout the resolution process.

## Bid Submission and Review

The FDIC sets a bid deadline. At least five days before the bid deadline, potential bank bidders should send to the OCC a draft P&A application and a copy of the FDIC submission. The OCC reviews the draft P&A application for accuracy, completeness, and adherence to key policies. Failure to meet the general guidelines, or submission of a proposal that may have an adverse supervisory effect on the acquiring bank, may lead the OCC to not grant the bank permission to submit a bid.

The P&A application consists of the following:

- [Interagency Streamlined Business Combination Application](#)
- Financial information
  - Pro forma balance sheet
  - Projected combined statement of income
  - Pro forma and projected regulatory capital schedule (including risk-based capital calculation)
- List of directors and senior executive officers of the resulting bank
- List of branches that require authorization
- Certification of compliance with laws and regulations
- Request for confidentiality, if applicable
- Other corporate requests (such as fiduciary powers or new branches)
- Filing fee, if applicable

In reviewing the P&A application, the OCC considers

- the purpose of the transaction;
- the capital level of the resulting bank;
- the conformity of the transaction to applicable laws, regulations, and policies;
- the impact of the transaction on the safety and soundness of the bank; and
- the effect of the transaction on the bank's shareholders or members, depositors, other creditors, and customers.

Under the Bank Merger Act (BMA), the OCC also considers

- the effect of the proposed transaction on competition;
- the financial and managerial resources and future prospects of the resulting bank;
- the probable effects of the transaction on the convenience and needs of the community served;
- the bank's effectiveness in combating money laundering activities, including overseas branches;
- the risk to the stability of the U.S. banking and financial systems; and
- the bank's performance in helping to meet the credit needs of the community, including low- and moderate-income neighborhoods.

The OCC reviews the application to determine whether the bank's plan presents a reasonable business strategy. If unprecedented or unusual banking services or corporate arrangements are proposed, the OCC may require additional information and may conduct a more extensive review.<sup>3</sup> In addition, the bank's performance record may cause the OCC to condition the bank's ability to bid to acquire a failing IDI or to prohibit the bank from submitting a bid.

The OCC's approval of the proposal is based on applicable supervisory and legal factors and the supporting information and analysis, rather than on the size of the premium. To maintain maximum flexibility, banks may disclose a premium range in the application. The acquiring bank must provide a satisfactory risk assessment relative to its ability to manage the acquisition successfully. The OCC reserves the right to approve or deny any proposal submitted based on its consideration of the applicable supervisory and legal factors.

The review and analysis of proposals sponsored by holding companies or by persons affiliated with other banking organizations (affiliated institutions) are not confined to the proposed acquisition. The OCC also considers the performance record of the holding company or affiliated institutions. The OCC may review Federal Reserve Y-6 reports, U.S. Securities and Exchange Commission filings, annual reports to stockholders, reports of examination, financial statements, and any other information available to the OCC in its supervisory capacity. In addition, a holding company's or affiliated institution's overall business plan (e.g., strategy, capital, management, and profitability) may be reviewed for consistency and compatibility with the proposal.

The strength of the holding company, combined with the direct support it offers to its bank subsidiaries, can mitigate concerns over capital, draft operating plans, or other supervisory matters. The OCC may approve an application when the holding company or affiliated institution serves as a substantial source of strength, even in markets where economic conditions are weak or competitive conditions are intense.

Conversely, the poor condition of a holding company or its affiliates, or the absence of any evidence of the holding company's support of its bank subsidiaries, may result in the OCC denying the application. When the bank proposing to acquire the failing IDI is affiliated with institutions subject to supervisory concerns, the OCC, based on the facts and circumstances involved, may deny the application or approve it subject to conditions.

Any questions the OCC has raised about the proposed transaction and the factors the OCC considers in its decision should be resolved before the FDIC's deadline. Once the OCC completes its review of the application, it will inform the FDIC of the proposal's acceptability, that it does not object to the bidder's submission, and that the OCC will grant the necessary final certification upon consummation of the transaction if the bank is selected as the winning bidder. The OCC will also contact the bank and inform them whether or not the bank may proceed with a bid.

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<sup>3</sup> Generally, the OCC eliminates from the bid list banks with significant supervisory concerns or those that are not large enough to acquire the failing IDI.

## Public Notice and Competitive Factors

Generally, an applicant for a business combination must publish notice of the filing. When the OCC determines that it must immediately approve an acquisition to resolve an actual or imminent failure of an IDI, the OCC waives the public notice requirement. Under the BMA, the OCC is required to request comments from the DOJ on the competitive effects of the transaction. When the OCC determines that it must immediately approve an acquisition to resolve an actual or imminent failure of an IDI, the OCC is not required to request a competitive factors report.<sup>4</sup>

## Legal Considerations

The P&A application should include a certification by an official of the bank that the proposed transaction conforms to applicable federal laws and regulations and is not in contravention of applicable state laws and regulations. This certification should indicate that any action required by law will be taken before consummation of the transaction. If the proposal presents novel or precedent-setting legal issues, an opinion from counsel should be provided.

## Accounting Considerations

Accounting for the acquisition of a failed IDI follows the same accounting principles that are used in any other nonaffiliated business combination. The “Business Combinations” booklet provides guidance on these issues. Certain acquisitions may result in a bargain purchase due to their nature, structure, and timing. In general, a bargain purchase occurs when the fair value of the net assets acquired exceeds the fair value of the consideration transferred by the acquiring institution. This excess should be recognized as a gain in earnings (bargain purchase gain), which increases equity under generally accepted accounting principles. In other circumstances, the amount paid to acquire the net assets of the failed IDI is greater than the fair value of those net assets. The premium paid is recognized as goodwill by the acquiring bank. For further guidance, refer to the [“Interagency Supervisory Guidance on Bargain Purchases and FDIC- and NCUA-Assisted Acquisitions.”](#)<sup>5</sup>

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<sup>4</sup> Section 2 of the Sherman Act (15 USC 2), as incorporated in paragraph 5 of the BMA (12 USC 1828(c)(5)(A)), remains applicable in a P&A acquisition of a failing IDI, including cases where overnight processing dispenses with notice to the DOJ and the request for a competitive factor report. When large post-acquisition market shares are anticipated, potential bidders are encouraged to speak with the DOJ and the OCC as early in the bidding process as possible to determine if a successful bid could trigger competitive considerations that would have an impact on the approval of an application under the BMA.

<sup>5</sup> As articulated in the guidance, although bargain purchase gains are included in the computation of regulatory capital for reporting purposes, a financial institution’s primary regulator may determine that the acquisition-date estimated bargain purchase gain lacks sufficient permanence as a component of regulatory capital for supervisory and licensing decision-making purposes. Therefore, for the purposes of calculating compliance with regulatory capital standards, the OCC generally requires that after the acquisition, the bargain purchase gain estimate should not be reported as regulatory capital until the value has been verified over a period not to exceed one year.

## Branches

To promote the continuation of banking services to the affected communities, the acquiring bank is generally expected to operate the branches, main office or home office (collectively, offices) of the failed IDI for at least 90 days after the acquisition. At the end of the 90-day period, the acquiring bank has the option to either retain or not retain any of the acquired offices as branches of the acquiring bank.<sup>6</sup> As appropriate, the OCC approves the retention of the acquired offices, at consummation, under applicable laws and regulations.

## Decision and Consummation

If an OCC-regulated bank is the winning bidder, the FDIC notifies the OCC a few days prior to the proposed failed IDI closing date. On the closing date, the FDIC is appointed as receiver, and it enters into a P&A transaction with the winning bank to purchase certain assets and assume certain liabilities of the failed IDI. On the same day, the OCC issues written approval of the P&A application. The OCC also issues a written certification of consummation and retention of offices following the consummation of the transaction, as appropriate.

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<sup>6</sup> An acquirer's decision to not retain a branch after the 90-day period does not constitute a branch closing. Therefore, no advance branch closing notice is submitted to the OCC.



# Glossary

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**Deposit Insurance Fund:** The insurance fund responsible for protecting depositors of FDIC-insured institutions from loss due to institution failures. The FDIC is the administrator of the Deposit Insurance Fund.

**Insured depository institution:** Any bank or savings association, as defined in 12 USC 1813(a) and (b), respectively, the deposits of which are insured by the FDIC.

**Premium:** An amount generally paid by the acquiring bank to the receiver to purchase the assets and assume the liabilities of a failed institution at an amount greater than fair value.

**Primary regulator:** The banking agency responsible for regulating a depository institution. The OCC is the primary regulator of national banks and federal savings associations. The appropriate state banking regulatory authority regulates its state-chartered institutions. In addition to a state bank's chartering authority, state banks have a primary federal regulator which is the FDIC, or in the case of state banks that are members of the Federal Reserve System, the Board of Governors of the Federal Reserve System. In a failure transaction involving an IDI, the OCC or the appropriate state banking regulatory authority notifies the FDIC when the IDI is in imminent danger of failing. The OCC, state authority, or FDIC in certain circumstances involving state banks, later determines that grounds for a receivership exist and appoints the FDIC as receiver.

**Purchase and assumption:** In the context of failure acquisition, this refers generally to the acquisition of a failed IDI that the receiver structures as a P&A transaction. A P&A transaction is governed by the P&A agreement between the purchaser and the receiver that transfers certain assets and deposits and other liabilities to the purchaser. Shareholders of the acquiring bank generally are not required to approve the transaction.

**Receiver:** A person or entity, including a government agency, appointed to handle the assets and liabilities of a failed institution. A receiver succeeds to all the interests and property owned by the failed institution. Congress requires the FDIC to be the receiver for federally chartered IDIs. The FDIC may accept appointment as the receiver of an insured state depository institution and has authority under certain circumstances to appoint itself as the receiver for an insured state depository institution.

# References

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In this section, “NB” denotes that the referenced law, regulation, or issuance applies to national banks, and “FSA” denotes that the reference applies to federal savings associations.

## **Assistance to Insured Depository Institutions**

Law 12 USC 1823, 1823(c)(1), (2)(a), 1823(f)(2)(A)

## **Branches**

Law 12 USC 36 (NB)

12 USC 1464(m), 1464(r) (FSA)

Regulation 12 CFR 5.30 (NB)

12 CFR 5.31 (FSA)

## **Federal Reserve Board**

Law 12 USC 222, 12 USC 501a (NB)

## **Fiduciary Powers**

Law 12 USC 92a (NB)

12 USC 1464(n) (FSA)

Regulation 12 CFR 5.26

## **Independent External Audit**

Law 12 USC 1831m

## **Investment in Bank Premises**

Law 12 USC 29, 371d (NB)

Regulation 12 CFR 5.37

12 CFR 7.1000 (NB)

## **Purchase and Assumption**

Law 12 USC 24(7) (NB), 1828(c)

Regulation 12 CFR 5.33, 5.53

## **Receivership and Conservatorship**

Law 12 USC 191 (NB)

12 USC 1464(d) (FSA)

12 USC 1821

## **Trust Bank**

Law 12 USC 27, 92a, 1841(c)(2)(D) (NB)

12 USC 1464, 1467a(a)(1)(D) (FSA)

Regulation 12 CFR 5.26

12 CFR 9 (NB)

12 CFR 150 (FSA)