December 4, 2018

MEMORANDUM TO: Board of Directors

FROM: Doreen R. Eberley
Director, Division of Risk Management Supervision

SUBJECT: Notice of Proposed Rulemaking to Increase the Major Assets Threshold Under the Depository Institutions Management Interlocks Act

Summary of Recommendation

Staff recommends that the FDIC's Board of Directors approve and authorize for publication in the Federal Register with a 60-day public comment period, the attached Notice of Proposed Rulemaking (NPR), entitled *Depository Institution Management Interlocks Act (DIMIA) Major Assets Prohibition: Thresholds Adjustment,* for publication in the *Federal Register*. The NPR would increase the major assets prohibition thresholds of the Depository Institution Management Interlocks Act (DIMIA) pursuant to the statute to account for market change. The proposed increase would raise the current major assets prohibition thresholds from $1.5 billion and $2.5 billion in total assets, respectively, to a single threshold of $10 billion. The NPR would also propose three additional options, two based on changes in the United States banking market and one to account for inflation. DIMIA permits the thresholds to be adjusted for inflation or market change. In most cases, adjusting the thresholds would relieve depository organizations with asset levels below the new thresholds from the requirement to seek an exemption to permit a prohibited management interlock.

The NPR would be issued jointly by the FDIC, the Board of Governors of the Federal Reserve System (Board) and the Office of the Comptroller of the Currency (OCC) (collectively the agencies).

SUPPLEMENTARY INFORMATION:

Rule Summary

The NPR would propose an increase in DIMIA major assets prohibition thresholds to account for market change since the last time the thresholds were set by statute in 1996. Additionally, the NPR would present two other alternatives that would adjust the thresholds based on different

CONCUR:

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measures of change in banking since the thresholds were last set and another alternative to account for inflation.

Background

DIMIA, 12 U.S.C. §§ 3201 *et seq.* is implemented through 12 C.F.R. Part 348 for FDIC-supervised institutions. The statute is intended to foster competition by prohibiting a management official from serving with unaffiliated depository institutions and their holding companies.

DIMIA sets forth three prohibitions:

1. Community: a management official may not simultaneously serve with an unaffiliated depository organization (defined by DIMIA to mean a depository institution or holding company) if those entities or their affiliates have offices in the same community as the management official's depository organization.

2. Relevant metropolitan statistical area (RMSA): a management official may not simultaneously serve with an unaffiliated depository organization if these entities or their affiliates have offices in the same RMSA as the management official's depository organization and each entity has total assets of $50 million or more.

3. Major assets prohibition: a management official of a depository organization with total assets exceeding $2.5 billion (or any affiliate of such an organization) may not simultaneously serve with an unaffiliated depository organization with total assets exceeding $1.5 billion (or any affiliate of such an organization), regardless of the location of the entities.

DIMIA provides that the agencies may adjust the thresholds as necessary to allow for inflation or market changes. See 12 U.S.C. § 3203. The major assets thresholds were last set through amendments to DIMIA by the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA). Current thresholds have therefore not been modified for over twenty years to reflect the growth and consolidation among U.S. depository organizations. Market changes have called into question the appropriateness of the current thresholds. In addition, in a March 2017 Report to Congress mandated by the EGRPRA, the agencies committed to reducing regulatory burden by adjusting the major assets thresholds.

Although the regulations provide that an adjustment for inflation would be published as a final rule without notice and comment, given the passage of time since the thresholds were last set, the agencies' staff believe it would be appropriate to seek comment in an NPR to adjust the thresholds.[1]

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[1] The agencies promulgated an interagency rule on January 1, 2000, which reflected the statutory increase in the asset thresholds to $1.5 billion and $2.5 billion. 64 Fed. Reg. 51673. The agencies' regulations were also amended at that time to provide that the agencies would adjust these thresholds, as necessary, based on the year-to-year

The Proposed Rule

Increase Asset Thresholds to $10 Billion

The NPR would raise and consolidate the two major assets prohibition thresholds into one $10 billion threshold. The major assets prohibition would thus be amended to restrict management interlocks between any depository organization with total assets exceeding $10 billion (or any affiliate of such an organization). The single $10 billion threshold reflects the value used at the Federal Reserve and is consistent with certain other laws and regulations that point to a $10 billion threshold as a differentiation between small and large banks for supervisory and regulatory purposes.[2]

Raising the lower threshold from $1.5 billion to $10 billion would add 418 FDIC-insured organizations to the 5,136 exempt from the current lower threshold. Of these 418 depository organizations, 223 are supervised by the FDIC, 84 are supervised by the Board, and 111 are supervised by the OCC. Raising the upper threshold from $2.5 billion to $10 billion would add 234 FDIC-insured organizations to the 5,318 exempt from the current upper threshold. Of these 234 depository organizations, 128 are supervised by the FDIC, 42 are supervised by the Board, and 64 are supervised by the OCC. As of year-end 2017, 148 FDIC-insured depository organizations report total assets greater than $10 billion.[3]

Under this approach, the adjustment would ensure that community banking organizations would not be subject to the major assets prohibition. Community banking organizations are generally not considered to be larger banking organizations in the current banking market. This approach can be characterized as in accordance with Congressional intent that the major assets prohibition apply to "larger" organizations.[4] In addition, agencies' staff believe that, absent other concerns, an interlock that would be permitted under these proposed new thresholds would not be expected to raise the corporate governance issues that could arise with interlocks between larger or systemically important financial institutions. However, since the adjusted threshold of $10

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change in the average of the Consumer Price Index for the Urban Wage Earners and Clerical Workers (CPI-W), not seasonally adjusted, with rounding to the nearest $100 million, by publishing a final rule without notice and comment in the *Federal Register*.

[2] See the Economic Growth, Regulatory Reform, and Consumer Protection Act, § 201, Pub. L. 115-174, 132 Stat. 1306, 1309 (2018) (enacting a "Community Bank Leverage Ratio" capital simplification framework that is generally available to depository institution and depository institution holding companies with $10 billion or less in total consolidated assets); id. § 203 (exempting generally from the prohibitions of section 13 of the Bank Holding Company Act of 1956, also known as the "Volcker Rule," certain entities with $10 billion or less in total consolidated assets). Also see, Pub. L. No. 111-203, §§ 1025 and 1026, 124 Stat. 1376, 1990-95 (2010) and 12 CFR 327.8(e) and (f). For the purposes of the FDIC's assessment regulations, a "small institution" generally is an insured depository institution with less than $10 billion in total assets. Generally, a "large institution" is an insured depository institution with more than $10 billion in total assets or that is treated as a large institution for assessment purposes under section 327.16(f).

[3] The counts and assets of FDIC-insured depository organizations are from the December 31, 2017 Consolidated Reports of Condition and Income (Call Reports) and the Reports of Assets and Liabilities of U.S. Branches and Agencies of Foreign Banks.

[4] *See* H.R. Rep. No. 95-1383, at 5 (1978); S. Rep. No. 95-323, at 13 (1977).

billion exempts more institutions than the other proposed thresholds, it is possible that it would pose an increased risk of anticompetitive behavior among banking organizations.

Additional Proposals for Threshold Adjustment

1. Major Assets Thresholds Adjustment Based on Percentage of Number of Banking Organizations Covered by Prohibition

As of fourth quarter 1996, the year in which the major assets prohibition thresholds were last set by statute, the thresholds exempted the bottom 89.1 percent and 92.2 percent of banking organizations by asset size.[5] By fourth quarter 2017, the percentage of banking organizations exempted by the thresholds had fallen to 68.8 percent and 78.1 percent.

To reflect market changes that have taken place since 1996, the NPR would propose adjusting the thresholds so that approximately the same percentage of the total number of banking organizations that were exempted as of fourth quarter 1996 would be exempted as of fourth quarter 2017. This approach would result in adjusted thresholds of $8.1 billion and $12.2 billion.

Raising the lower threshold from $1.5 billion to $8.1 billion would add 395 FDIC-insured depository organizations to the 5,136 exempt from the current lower threshold. Of these 395 depository organizations, 214 are supervised by the FDIC, 78 are supervised by the Board, and 103 are supervised by the OCC. Raising the upper threshold from $2.5 billion to $12.2 billion would add 256 organizations to the 5,318 exempt from the current upper threshold. Of these 256 depository organizations, 138 are supervised by the FDIC, 44 are supervised by the Board, and 74 are supervised by the OCC. As of year-end 2017, 45 FDIC-insured depository institutions report total assets greater than $8.1 billion, but less than $12.2 billion. Finally, 126 FDIC-insured depository organizations report total assets greater than $12.2 billion.[6]

2. Thresholds Adjustment Based on Asset Growth

Under this approach, the NPR would adjust the thresholds in proportion to the rate of asset growth for all depository institutions, both banks and credit unions from fourth quarter 1996 to fourth quarter 2017. This approach seeks to replicate the major assets prohibition's coverage of the 1996 banking market by using asset growth as a measure of market change. Under this approach, the asset thresholds would be raised from $1.5 billion and $2.5 billion to $5.3 billion and $8.8 billion, respectively.

Raising the lower threshold from $1.5 billion to $5.3 billion would add 328 FDIC-insured organizations to the 5,136 exempt from the current lower threshold. Of these 328 depository

[5] For purposes of this analysis, "banking organizations" were used in place of "depository organizations" in order to avoid double-counting the assets of depository institutions held by depository holding companies that reported consolidated holding company assets on Form Y-9C. As used here, the term banking organization includes all holding companies that reported consolidated assets using Form Y-9C greater than zero and all depository institutions with reported assets greater than zero that are not consolidated under a holding company financial report. The term banking organizations excludes non-depository trust companies.

[6] See FN 1.

organizations, 30 are supervised by the FDIC, 279 are supervised by the Board, and 19 are supervised by the OCC. Raising the upper threshold from $2.5 billion to $8.8 billion would add 223 FDIC-insured organizations to the 5,318 exempt from the current upper threshold. Of these 223 depository organizations, 23 are supervised by the FDIC, 186 are supervised by the Board, and 14 are supervised by the OCC. As of year-end 2017, 72 FDIC-insured depository organizations report total assets greater than $5.3 billion, but less than $8.8 billion. Finally, 175 FDIC-insured depository organizations report total assets greater than $8.8 billion.[7]

This proposal would amend the thresholds by the average change in the value of assets held by all depository organizations, thereby representing market changes for the depository intermediation sector in general. Thresholds of $5.3 billion and $8.8 billion exempt more organizations than the proposed threshold adjustments based on inflation, so it is possible that they pose an increased risk of anticompetitive behavior among depository organizations relative to the proposed thresholds. However, by exempting more organizations than an inflation based adjustment, this alternative may provide greater amounts of cost savings and benefits for the affected institutions than the inflation option.

Adjustment Based on Inflation

Adjusting the asset thresholds for inflation based on CPI-W from the fourth quarter of 1996 to the fourth quarter of 2017 would increase the thresholds in the major assets prohibition from $1.5 billion and $2.5 billion to $2.3 billion and $3.9 billion, respectively.

It is estimated that a threshold adjustment based on inflation will affect a relatively small percentage of FDIC-insured depository institutions. As of year-end 2017, the current lower threshold of $1.5 billion exempts 5,136 FDIC-insured depository organizations from restrictions on interlocks pursuant to the major asset test. Another 543 institutions are above the lower threshold and potentially subject to restrictions on interlocks. There were 361 FDIC-insured institutions with assets exceeding the current upper threshold of $2.5 billion that were subject to restrictions on management interlocks with institutions whose assets exceeded the lower threshold. Raising the lower threshold from $1.5 billion to $2.3 billion would exempt an estimated additional 169 FDIC-insured depository organizations. Of these 169, 89 are supervised by the FDIC, 37 are supervised by the Board, and 43 are supervised by the OCC. Raising the upper threshold from $2.5 billion to $3.9 billion would exempt an estimated additional 102 FDIC-insured depository organizations. Of these 102, 57 are supervised by the FDIC, 14 are supervised by the Board, and 31 are supervised by the OCC.[8]

[7] See FN 1.
[8] See FN 1.

Recommendation

Staff recommends that the Board approve the attached Resolution to authorize publication of the NPR entitled *Depository Institution Management Interlocks Act (DIMIA) Major Assets Prohibition: Thresholds Adjustment* in the *Federal Register*.

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Attachments